Digest of
Water Resources Decisions
Pollution Control Hearings Board

2002 Edition

Cases through October 31, 2002

Prepared by
Mentor Law Group, PLLC

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INTRODUCTION

When the Washington State Legislature created the Department of Ecology in 1970, it assigned to the new agency not only pollution control functions, but also a major resource management program. The Department of Ecology was given responsibility for the elaborate state administrative system for the control of water use.

With the establishment of the new agency, the Legislature also created a quasi-judicial panel to hear and decide appeals from the agency's decisions on permits and enforcement. From the outset, the Pollution Control Hearings Board, has served as the primary trial forum in the state for litigation involving water resource management.

The Hearings Board is completely independent of the Department of Ecology, yet the Board's proceedings are considered part of the administrative process. The Board's decisions are not recommendations. If not appealed, they are final. The Department of Ecology appears before the Hearings Board as an ordinary litigant in de novo proceedings. Its decisions, however, represent a final decision of the agency. Under the Administrative Procedures Act, they are subject to judicial review in the same manner as other final agency decisions.

Over the years, the Pollution Control Hearings Board has developed a considerable body of law on water resource questions. Because most cases brought to the Hearings Board are not appealed further, many of the Board's decisions deal with the issues that have not been addressed by appellate courts. Until 1992, the only access to these decisions had been through the memories of persons who had been involved with the Hearings Board's work. In that year, Wick Dufford set out to end this oral tradition. Mr. Dufford's Water Resource Digest presented a comprehensive outline of Washington water law with brief summaries of the major points of the decisions of the Pollution Control Hearings Board under the appropriate topical headings. Included initially were all final water resource opinions of the Hearings Board rendered in contested cases from the beginning of its operations in 1970 through 1990.

This volume continues Mr. Dufford's efforts by summarizing water resource opinions of the Hearings Board from 1990 through October 31, 2002. In updating the digest, Pollution Control Hearings Board cases were distributed to a number of practitioners who reviewed case summaries, which become the basis of the revised version.

--Editors, October 31, 2002

DEDICATION

This Digest is dedicated to four individuals who influenced the development of Washington's water laws: Wick Dufford, Ralph Johnson, Charles B. Roe, Jr. and Chris Smith Towne. Chris Smith Towne influenced the development of Washington's water policy for over three decades, having served as an early member of the Pollution Control Hearings Board, and only recently having retired as one of the Governor's Water Policy Advisors. Charlie Roe served for many years as an assistant attorney general, and was responsible for drafting many of the legislative provisions interpreted by the Board and described in this Digest. Ralph Johnson taught water law at the University of Washington School of Law for several years, and was instrumental in changing how we reconcile public and private interests in the waters of Washington State. Wick Dufford, who also served as a Board member and assistant attorney general, was responsible more than anyone for making the body of law developed by the PCHB accessible to the public, a tradition the authors of this Digest hope to continue into the future.

Finally, the Editors and Contributors of this 2002 Edition of the Digest would like to make a special dedication to the memory of Deborah Mull, one of the Administrative Appeals Judges at the Environmental Hearings Office. Deborah Mull passed away unexpectedly on April 29, 2002. Deborah joined the Environmental Hearings Office in December 2000 after a distinguished career with the Washington Attorney General's Office, most recently representing Ecology on water resource matters.

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I. JURISDICTION

A. STATUTORY BASIS

1. GRANT OF AUTHORITY TO BOARD

Jurisdiction for the Pollution Control Hearings Board (PCHB) is established through RCW 43.21B.110. As related to water resources, authority is granted the PCHB to hear and decide appeals from decisions of Ecology (Ecology), as follows.

(a) Civil penalties imposed pursuant to RCW 90.03.600. (Also see RCW 86.16.081 and RCW 18.104.155.)

(b) Orders issued pursuant to RCW 43.27A.190, RCW 86.16.020 and RCW 90.14.130. (Also see RCW 18.104.060.)

(c) Except as provided in RCW 90.03.210(2), the issuance, modification, termination or denial of any permit, certificate or license by Ecology.

The PCHB is not, under law, a regulatory or enforcement authority. It does not have the power to investigate, hear, or decide a permit holder's alleged wrongdoings absent an enforcement action first taken by Ecology. Hall v. DOE, PCHB No. 92-32 (1992).

The PCHB, by statute, has authority only to determine whether a permit, as issued, was justified under provisions of the law, with no resultant material environmental impact or detriment to the rights of others, and with appropriate conditions imposed. The PCHB's determinations cannot be based on fears or suppositions that the terms of the permit will be violated. Hall v. DOE, PCHB No. 92-32 (1992).

The PCHB was created by the Legislature to provide independent, expert and uniform adjudication of actions by Ecology. The state courts have recognized the PCHB's independent role and expertise on numerous occasions. The PCHB cannot fulfill its independent role unless it has the opportunity to develop its own factual record. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994); Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The PCHB has the authority, to be used sparingly, to raise an issue essential to do justice in a particular case. Stenback v. DOE, PCHB No. 93-144 (1994).

The PCHB's rules give its Presiding Officer authority to dismiss an appeal or take other appropriate actions if a party or representative fails to appear at a prehearing conference, hearing, or at any other stage of the appeal proceeding. Tam O'Shanter, Inc. v. DOE, PCHB No. 96-18 (1996); Kaderly v. DOE, PCHB No. 96-152 (1997).

Public policy issues are properly addressed to the Legislature, not the judiciary. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Procedures on judicial review of a decision of the PCHB are governed by the Administrative Proceduress Act (chapter 34.05 RCW). Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

The PCHB has only that authority granted to it by the Legislature. Muckleshoot Indian Tribe v. DOE, PCHB No. 00-070 (2000).

Under RCW 43.21B.090, the PCHB may act even though one position of the PCHB is vacant. Lake Entiat Lodge v. DOE, PCHB No. 01-025 (2001) .

Under RCW 43.21B.100, at least two members of the PCHB must agree to a decision for it to be final. Where less than two members are in agreement, the effect of the decision is to affirm the matter on appeal. DOE v. City of Kirkland, 84 Wn.2d 25, 523 P.2d 1181 (1974); Lake Entiat Lodge v. DOE, PCHB No. 01-025 (2001) .

The PCHB lacks jurisdiction to issue an advisory opinion. An agency can only do that which the legislature has authorized it to do. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

The PCHB lacks jurisdiction to require a water right holder to put its water right to irrigation use. Thurlow v. DOE, PCHB No. 00-189 (2001).

2. TYPE OF DECISIONS REVIEWED

The PCHB's jurisdiction is limited to "adjudicative proceedings" as that term is defined in the Administrative Proceduress Act, RCW 34.05.010(1). These are cases of "law applying" rather than "law-making." See City of Seattle v. DOE, 37 Wn. App. 819, 683 P.2d 244 (1984). (WD)

Water resources decisions reviewed by the PCHB include:

(a) Administrative orders (cease and desist orders; orders specifying corrective action) - RCW 43.27A.190.

(b) Posting of headgate or controlling works - RCW 90.03.070, RCW 43.27A.190.

(c) Grant or denial of surface water appropriation permits (including permit conditions) - RCW 90.03.290.

(d) Cancellation or extension of surface or groundwater appropriation permits - RCW 90.03.320.

(e) Approval of construction or modification of dams or controlling works - RCW 90.03.350.

(f) Reservoir permits (including secondary permits for use of water stored in reservoirs) – RCW 90.03.370.

(g) Change of place of diversion, place of use, purpose of use (surface water) – RCW 90.03.380.

(h) Grant or denial of groundwater appropriation permits (including permit conditions) – RCW 90.44.060.

(i) Change of point of withdrawal, place of use, manner of use (groundwater) – RCW 90.44.100.

(j) Declaration of claims to artificially stored groundwater – RCW 90.44.130.

(k) Regulatory orders relating to flood plain management – RCW 86.16.020.

(1) Regulatory orders relating to water well construction – RCW 18.104.060.

(m) Civil penalties for water code violations – RCW 90.03.600.

(n) Civil penalties for well construction violations – RCW 18.104.155.

(o) Forfeiture of water rights for non-use – RCW 90.14.130.

(p) Decisions, other than rule-making, made under the Family Farm Water Act - RCW 90.66.080.

Ecology's decision on an application for a water permit is discretionary and any challenges to that decision must first be brought in an appeal to the PCHB. Boast v. DOE, PCHB No. 94-155 (1994); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

An order granting a change for a surface water right under RCW 90.03.380 is subject to review by the PCHB under RCW 43.21B.110. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

Under RCW 43.21B.110(1)(C), the PCHB is the proper forum for appeal of a decision on a water rights change application. Anderville Farms, Inc. v. DOE, PCHB No. 00-62 (2000).

The PCHB is expressly prohibited from conducting hearings on proceedings of Ecology relating to general adjudications of water rights pursuant to 90.03 RCW or 90.44 RCW. Muckleshoot Indian Tribe v. DOE, PCHB No. 00-070 (2000).

Ecology's denial of appellant's requests for modification of a report and rescission of an order of cancellation did not establish or remove any rights in waters of the state and therefore was not subject to review under RCW 43.21B.110. Lake Entiat Lodge Assoc. v. DOE, PCHB No. 00-127 (2000).

Agreements entered by DOE concerning water flow obligations are entered in DOE's capacity as trustee of the state's waters, making the Agreements reviewable under the Administrative Procedures Act. Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

B. SCOPE OF REVIEW AUTHORITY

1. GENERALLY

Where the conditions of a stipulated settlement are not carried out, the PCHB may subsequently permit the appellant's case to be heard on the merits. Myers v. DOE, PCHB No. 430 (1977).

An applicant is not by law entitled to notice and opportunity for hearing prior to Ecology's denial of a permit application. An appeal asserting that such a denial is defective for lack of such a prior hearing must be dismissed. Cole v. DOE, PCHB No. 957 (1976).

There is no legal basis for the PCHB to reform a validly issued permit. However, equity may justify reformation of permit conditions which result from nonmaterial unilateral mistakes. On the facts of the case, equitable considerations did not warrant Board modification of permitted acreage mistakenly requested. Karlsson v. DOE, PCHB No. 1004 (1976).

The PCHB reviews permit decisions in light of policies explicitly expressed in legislative enactments. The determination of water resource

policy in the first instance is not for the PCHB to make. Heer v. DOE, PCHB No. 1135 (1977).

Conditions accepted in a permit which was not appealed, cannot be collaterally attacked in a subsequent appeal of an order seeking to enforce the terms of the permit. Dept. of Natural Resources v. DOE, PCHB No. 1055 (1978).

In reviewing a permit decision, the PCHB is limited to the matter before it. Administrative decisions not affecting the instant approval and inaction on other applications cannot be indirectly challenged by a collateral attack. Andrews and Peterson v. DOE, PCHB No. 77-4 (1977).

In appeal of a cease and desist order issued by Ecology, the PCHB is not empowered to compel Ecology to process an application for a groundwater permit. Peterson v. DOE, PCHB No. 77-15 (1977) *aff'd* Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).

Ecology's tentative determination of the extent of un-adjudicated vested rights is subject to review on the merits by the PCHB. Mackenzie v. DOE, PCHB No. 77-70 (1979); Riddle v. DOE, PCHB No. 77-133 (1978).

The failure to challenge a particular administrative conclusion in a superior court review of a final decision of an administrative body precludes consideration of that issue by an appellate court. Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).

The PCHB has authority to entertain only matters contained in appealable decisions or orders. A letter signed by one not authorized to make an appealable decision is not reviewable by the PCHB. Harter v. DOE, PCHB No. 78-3 (1978); Phillips v. DOE, PCHB No. 80-24 (1980); Gerry v. DOE, PCHB No. 82-52 (1982).

The PCHB may impose conditions on a permit to insure that approval of an application meets statutory requirements. Heer v. DOE, PCHB No. 1135 (1977); Wilbert v. DOE, PCHB No. 82-193 (1983).

Appellate review of cases in equity is the same as for cases at law. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Ecology has broad discretion concerning the approval of water rights permits, as does the PCHB, which has exclusive jurisdiction to conduct administrative adjudicative proceedings relating to the grant or denial of water right permits. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994); Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166

through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Judicial review of an adjudicative decision made by the PCHB is governed by the Administrative Proceduress Act (chapter 34.05 RCW). Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The PCHB has jurisdiction to consider evidence tending to show whether an appropriation is consistent with the public interest under RCW 90.03.290, including whether water will be allocated based on securing the maximum net benefit, as provided under the Water Resources Act. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

The PCHB has jurisdiction to review any Ecology decision that must be decided as an adjudicative proceeding under the Administrative Proceduress Act, chapter 34.05 RCW. Lake Entiat Lodge Assoc. v. DOE, PCHB No. 00-127 (2000).

2. JURISDICTIONAL LIMITS

Generally

The PCHB's jurisdiction is limited to review of final decisions and orders of Ecology. The PCHB has no authority to order members of the public to cease to withdraw water exempt from permit under the groundwater statute, even if it can be established that the cumulative effect of such withdrawals is not in the public interest. Fancher v. DOE, PCHB No. 983 (1976).

The PCHB is without jurisdiction to grant relief on a citizen's complaint against a well driller under RCW 18.104.120. Ecology may sanction drillers through license suspension or revocation, which action is then appealable to the PCHB. Nicolai v. B & I Well Drilling, PCHB No. 78-99 (1978).

A right to use water from a well on another's property may be granted by Ecology, but allegations concerning neither private rights of access to the well nor approvals to be acted upon by health authorities are within the jurisdiction of the PCHB. Karl & Leah v. DOE, PCHB No. 81-19 (1981).

RCW 90.03.360 requires owners to maintain controlling works and measuring devices "to the satisfaction" of Ecology. Where such devices have been installed pursuant to department order, the PCHB does not

have jurisdiction to review a third party's allegation that the devices are inadequate. Teanum Canal Co. v. DOE, PCHB No. 86-193 (1987).

Consideration of an agency's performance period is not an issue within the PCHB's jurisdiction in the absence of any statutory or regulatory time limitations. Steffans v. DOE, PCHB No. 92-1 (1992).

Once an administrative body has issued a final order and the aggrieved party's administrative appeal is limited to a hearing before an administrative body that lacks authority to make the decision, the party may obtain review of the order in superior court pursuant to the court's inherent power to review administrative actions. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

Neither Ecology nor the PCHB has authority to adjudicate the priorities of competing water rights. Issues of competing water rights are solely within the province of the superior court pursuant to RCW 90.03.110-.245. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

The PCHB lacks jurisdiction to review an action of Ecology, unless it is authorized to do so under RCW 43.21B.110. Essentially, the PCHB's jurisdiction over water rights under RCW 43.21B.110(1)(a)-(c) is limited to permit decisions, civil penalties and regulatory orders. Bohart, et al. v. DOE, PCHB Nos. 94-49 & 50 (1994).

Petitions for writ of mandamus, filed pursuant to Ch. 7.16 RCW, are not within the jurisdiction of the PCHB to consider, but rather are within the jurisdiction of the superior court. Boast v. DOE, PCHB No. 94-155 (1994).

Although the PCHB does not have jurisdiction to consider a Petition for Writ of Mandamus filed under 7.16 RCW, an applicant, pursuant to a writ of mandamus, cannot have a superior court issue an order directing Ecology to make a specific decision on an application for a water permit, and thereby circumvent both Ecology's discretionary authority to make a decision on the permit application and the PCHB's jurisdiction to review Ecology's decision. Boast v. DOE, PCHB No. 94-155 (1994).

The Board lacks jurisdiction to adjudicate issues regarding the issuance of a permit where Ecology has not made an initial determination. Andrews v. DOE, PCHB No. 97-20 (1997).

The PCHB lacks subject matter jurisdiction over an application for adjudicative proceeding on Ecology's entry into an interlocal agreement. There is no law requiring an agency's entry into an interagency agreement be subject to an adjudicatory proceeding. Muckleshoot Indian Tribe v. DOE, PCHB No. 00-070 (2000).

Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal. Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Authority, 98 Wn. App. 121, 989 P.2d 102 (2000); Muckleshoot Indian Tribe v. DOE, PCHB No. 00-070 (2000).

Ecology's letter denying appellant's requests for modification of a report and rescission of an order of cancellation did not establish or remove any rights in waters of the state, therefore, was not subject to review under RCW 43.21B.110. Lake Entiat Lodge Assoc. v. DOE, PCHB No. 00-127 (2000).

Agency Rule-Making

The PCHB's authority, as expressed in chapter 43.21B RCW and the Administrative Proceduress Act, does not extend to determining the validity of rules adopted by Ecology. Seattle Water Department v. DOE, PCHB No. 79-165 (1980), aff'd City of Seattle v. DOE, 37 Wn. App. 819, 683 P.2d 244 (1984).

Administrative rules cannot modify or amend a statute. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

The PCHB lacks jurisdiction to overturn a rule adopted by Ecology closing a basin to further appropriation, which constitutes a determination that further appropriations would impair existing rights and instream values protected by statute. Herzl Memorial Park v. DOE, PCHB No. 96-54 (1996); Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996); Union Hill Water And Sewer District v. DOE, PCHB No. 96-94 (1996); Sammamish Plateau Water & Sewer District v. DOE, PCHB Nos. 96-144 & 96-154 (1996).

The PCHB lacks jurisdiction to overturn a rule adopted by Ecology establishing minimum stream flows, which constitutes a determination that further appropriations would impair existing rights and instream values protected by statute. Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996); Cottingham v. DOE, PCHB No. 96-125 (1996).

An administrative rule is invalid if it is not adopted in compliance with the Administrative Proceduress Act. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

An agency directive or regulation that has 'general applicability' is not an administrative rule for purposes of the Administrative Proceduress Act

unless it falls within one of the categories specified by RCW 34.05.010(15). Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

An agency procedure developed in response to legislative budget cuts allowing the agency to perform its statutory duties in a more cost effective manner constitutes an administrative rule subject to the rule-making procedures of the Administrative Proceduress Act (RCW 34.05) if the procedure prioritizes the performance of, and adds a prerequisite to, the agency's statutory duties. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

The purpose of the rule-making procedures of the Administrative Proceduress Act is to ensure that members of the public can participate meaningfully in the development of agency policies that affect them. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Under RCW 34.05.570(2)(c), an agency policy, directive, or regulation that qualifies as an administrative rule under RCW 34.05.010(15) is invalid if it has not been adopted pursuant to the rule-making procedures of the Administrative Proceduress Act. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

An administrative agency may enforce a statutory requirement without first adopting a rule in furtherance thereof. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Constitutional Issues

The PCHB's jurisdiction does not extend to resolution of constitutional questions. Benningfield v. DOE, PCHB No. 87-106 (1987).

When Ecology's order is resisted on the assertion that there is an existing right, whether the entry of such an order without a prior hearing violates due process is a constitutional issue over which the PCHB has no jurisdiction. W-I Forestry Products v. DOE, PCHB No. 87-218 (1988).

The PCHB may address the constitutionality of regulations, statutes, or orders, as applied to the facts before the Board. Inland Foundry Co., Inc., v. Spokane County Air Pollution Control Auth., PCHB Nos. 94-150 & 94-154 (1994); citied in Packwood Canal v. DOE, PCHB No. 97-190 (1998).

Constitutional issues of equal protection are beyond the jurisdiction of the PCHB. The PCHB will not consider a constitutional claim as a defense to an alleged violation. Lewis v. DOE, PCHB Nos. 96-272 and 96-273 (1997).

A statute or rule that does not affect personal conduct is not subject to challenge under the void for vagueness doctrine. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

3. STANDARD OF REVIEW

Generally

The PCHB accepts the truth of the evidence offered by applicant and draws all favorable inferences that may reasonably be made. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

An appellate court reviews a trial court judgment on judicial review of an administrative decision by applying the review standards of RCW 34.05.570(3) directly to the record that was before the administrative decision maker. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

A court may overturn a PCHB decision if the decision is based upon an erroneous interpretation or application of the law, is unsupported by substantial evidence in the record, or is arbitrary and capricious. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

An unchallenged administrative finding of fact is a verity before a reviewing court. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

De Novo Review

It is not always an adequate basis for reversal for an appellant to establish that the findings upon which Ecology's decision was made were incomplete. Such findings can be interpreted and supplemented at the de novo formal hearing before the PCHB. Heer v. DOE, PCHB No. 1135 (1977).

In making its decision to grant or deny a permit, Ecology need only issue findings and conclusions which address the criteria of RCW 90.03.290. Because the PCHB's review is de novo, Ecology is entitled to adduce evidence at hearing in support of its approval which does not coincide exactly with a theory advanced in its Report of Examination. Appellant has the opportunity to conduct discovery and to call or cross-examine witnesses to ascertain or contradict Ecology's position. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

An appellate court may substitute its determination of an issue of law for that made by an administrative agency, although the agency's interpretation of the law is entitled to substantial weight. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

The proper test for determining beneficial use of water rights acquired by appropriation, including the identity and weight of factors used in the test, is a question of law that is reviewed de novo by an appellate court. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

The PCHB, in its de novo review, gives due deference to Ecology's specialized knowledge and expertise regarding hydrology when it reviews decisions made by Ecology. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994); Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The PCHB decides de novo whether a water user acted diligently to perfect its right to store water under a reservoir permit. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996)

The PCHB accepts the truth of the evidence offered by applicant and draws all favorable inferences that may reasonably be made. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

The PCHB reviews the reasonableness of a civil penalty de novo. In determining reasonableness, the PCHB looks to the nature of the violation, the prior behavior of the violator, and actions taken to rectify the problem. Gaydeski v. DOE, PCHB No. 96-10 (1996).

The PCHB reviews denials of water right permit applications de novo. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995); Schrum v. DOE, PCHB No. 96-36 (1996); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997); Chandler v. DOE, PCHB No. 96-35 (1997); Oetken v. DOE, PCHB No. 96-42 (1997); Strobel v. DOE, PCHB No. 96-52 (1997).

Under WAC 371-085-485(1), the PCHB reviews Ecology permit decisions de novo, and makes findings of fact based on a preponderance of the evidence. Cascade Investment Properties, Inc., et al. v. DOE, PCHB Nos. 97-47 & 48 (1997).

Although the conclusions of law made by an administrative agency having expertise in the affected area are not controlling on a court, they are entitled to due deference. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The standard of review applied by the PCHB in the area of water rights is both procedurally and substantively de novo. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994); Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The PCHB would be unable to provide an independent review without applying a substantive de novo standard of review. An "abuse of discretion" or other deferential standard of review would violate the legislature's directive that the PCHB provide the procedural safeguard of a full, expert, independent adjudication of environmental controversies. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994); Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

In the PCHB's de novo proceedings, Ecology may proceed on an altered footing from the one which it began upon, if it believes that the same result can be sustained. This is analogous to the rule that an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

Under the error of law standard of RCW 34.05.570(3)(d), a court reviewing an administrative adjudication may substitute its interpretation of the law for that made by the administrative decision maker. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

An administrative agency's construction of a statute is subject to de novo review under the error of law standard. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Agency decisions and interpretations of a statute's meaning before the PCHB are reviewed de novo. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Substantial Evidence

The PCHB has the duties and powers granted to an agency by those provisions of chapter 34.04 RCW relating to "contested cases." Its standard of review, therefore, is not limited by RCW 34.04.130, (e.g., clearly erroneous, arbitrary and capricious) but is rather a preponderance of the evidence presented. Heer v. DOE, PCHB No. 1135 (1977).

Findings of fact which are supported by substantial evidence will be accepted on review although conflicting evidence was before the trier of fact. Dodge v. Ellensburg Water Co., 46 Wn. App. 77, 729 P.2d 631 (1986).

An appellate court reviews findings of fact determined by a referee and confirmed by a trial court under the substantial evidence test. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

An agency determination based heavily on a complex and technical factual matter that is well within the agency's range of expertise is entitled to substantial judicial deference. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

An appellate court reviews a trial court's findings of fact to determine if they are supported by substantial evidence in the record. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Administrative findings of fact are entitled to great deference upon judicial review. Under the substantial evidence standard, a reviewing court must uphold an agency's findings of fact if they are supported by evidence that is substantial when viewed in light of the whole record; the court may not substitute its own factual determinations to arrive at a contrary conclusion. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Abuse of Discretion

Ecology's decision to issue a water appropriation permit under RCW 90.03.290 is reviewed under the abuse of discretion standard. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

An administrative agency abuses its discretionary authority by exercising its discretion in a manner that is manifestly unreasonable or on untenable grounds or for untenable reasons. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

The reasonableness of an attorneys' fee award is reviewed under the abuse of discretion standard. Discretion is abused only if it is exercised in a manifestly unreasonable manner. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

A court may overturn a discretionary water permit decision made by Ecology if the decision constitutes a clear abuse of discretion. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

A discretionary administrative decision that is contrary to the law constitutes a clear abuse of discretion. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

A court reviewing the validity of an agency's inaction under the arbitrary or capricious standard or by acting outside statutory authority must consider any legislatively mandated budget restraints on the agency and decide the matter in the context of any such restraints. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

An agency has not acted arbitrarily or capriciously by failing to perform a statutorily mandated duty within a reasonable time if the agency's failure to perform is the result of reordered priorities and modified procedures reasonably made in reaction to legislative budget constraints. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Administrative action is not arbitrary and capricious unless it is willful, unreasoning, and taken without regard to the attending facts and circumstances. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

When there is room for two opinions, administrative action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

4. BURDEN OF PROOF

Generally

When Ecology has determined a reasonable pumping lift range, a protestant has the burden of proving that a given lift is unreasonable as to him. Pierret and Heer Brothers v. DOE, PCHB No. 894 (1976).

Impairment of existing rights must be proven by appellant. Where Ecology makes a prima facie showing that a well will not affect surface flows, the agency will be affirmed if appellant does not controvert Ecology's case. Fancher v. DOE, PCHB No. 983 (1976).

Ecology's findings which appear in the Report of Examination represent a prima facie case as to the determinations made therein. It is incumbent upon appellants, who have the burden of proof, to rebut such presumptions. Heer v. DOE, PCHB No. 1135 (1977).

In support of an order to cease diversion because of impairment of prior rights, Ecology must show that it has determined such rights are in

existence and that such determination was correct on the merits. Riddle v. DOE, PCHB No. 77-133 (1978).

In asserting that a groundwater permit will impair existing rights, an appellant has the initial burden of proving one of two threshold conditions: a) that the proposed well will, beyond speculation, have a detrimental effect on an existing well, or b) that well levels in the area show a substantial, cumulative increase in pumping lifts. If neither threshold condition is found to exist, there can be no impairment. Pair v. DOE, PCHB No. 77-189 (1978).

If the evidence raises substantial question as to the correctness of Ecology's permit decision, the PCHB may remand the matter to the agency for further consideration, even though appellant has not demonstrated that Ecology was wrong. Klover v. DOE, PCHB No. 80-150 (1981).

Where after hearing it appears that, contrary to the application, an applicant would be satisfied with an additional point of withdrawal, rather than a total change in place of withdrawal, with a smaller quantity and with periodic rather than continuous use, the matter may be remanded to Ecology for reconsideration. Brem Rock v. DOE, PCHB No. 81-204 (1982).

If on appeal to the PCHB, an applicant seeks to change his project from the proposal denied by Ecology, the denial may be affirmed and the applicant obliged to file a new application. Taylor v. DOE, PCHB No. 82-2 (1982).

To sustain a regulatory order, Ecology must show either a present violation of law or the imminent threat of such a violation. Brownell v. DOE and Williams, PCHB No. 85-135 (1985).

Ecology, in regulating water use, must make a tentative determination of the validity of a water right claim. The bald assertions on a claim form are of little value in themselves in demonstrating the truth of the matters asserted. For the agency to give such a claim any credence, there must be evidence independent of the claim, and this type of evidence must be brought to the agency's attention soon enough to effectively influence the enforcement decision. Williams v. DOE, PCHB No. 86-63 (1986).

Ecology has the burden of proof to establish there is no permit or registered right that authorizes appellant's current practices. Once Ecology has made its case in this regard, the burden shifts to appellant to establish the existence of a water right to support his current practices. Fletcher v. DOE, PCHB No. 94-68 (1994).

The burden of proof lies with the appellant to show, by a preponderance of the evidence, that Ecology has erred in reaching its determination. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995).

Ecology's Reports of Examination are deemed prima facie correct and the burden of proving them to be erroneous is on the party attacking them. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995).

Where appealed orders are not regulatory and do not involve penalties, the initial burden of proof is on appellant. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

An administrative finding of fact satisfies the arbitrary and capricious standard of RCW 34.05.570(3)(i) if it is supported by evidence in the administrative record. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The burden of establishing the invalidity of agency action is on the party asserting the invalidity. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Permit Approval

When a permit approval is appealed, Ecology need not affirmatively show that the appropriation is in the public interest. Bogstad v. DOE, PCHB No. 539 (1975).

Appellant bears the burden of proof to show Ecology erred in granting a permit based on an incorrect determination that: 1) water was available for appropriation for a beneficial use; 2) the appropriation would not impair existing rights, or 3) the appropriation would not impair the public interest. Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995).

Appellant bears the burden of showing Ecology erred in granting a water right permit. Hall v. DOE, PCHB No. 92-32 (1992); Porter v. DOE, PCHB No. 95-44 (1996).

Permit Denial

Appellant's burden, on appeal of a denial of an application to appropriate water, is to show, by a preponderance of the evidence, that Ecology has erred in respect to the statutory determinations it must make under RCW 90.03.290. Ballestrasse and Chaves v. DOE, PCHB No. 78-51 (1978); Zwar v. DOE, PCHB No. 78-233 (1979).

Appellant has the burden of proof on appeal of an Ecology decision to deny a water right application. Steffans v. DOE, PCHB No. 92-1 (1992); Summers v. DOE, PCHB No. 91-42 (1992); Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

Appellant bears the burden of proving a water right application meets the four criteria of RCW 90.03.290. Schrum v. DOE, PCHB No. 96-36 (1996); Chandler v. DOE, PCHB No. 96-35 (1997); Oetken v. DOE, PCHB No. 96-42 (1997); Strobel v. DOE, PCHB No. 96-52 (1997); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

Variances

When appealing a denial of a variance of the casing requirements found in chapter 173-160 WAC, the applicant has the burden of proof to establish Ecology erred. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

Penalties and Enforcement

Under WAC 371-08-183, which provides the burden of proof required at the PCHB, the issuing agency has the initial burden of proving a violation occurred. If the initial burden is met, the burden shifts to the penalized party to show the amount of a civil penalty is unreasonable. Fletcher v. DOE, PCHB No. 94-178 (1995), expressly abanoned by M/V An Ping 6 v. DOE, PCHB No. 94-118 (1995).

Pursuant to WAC 371-08-183(3), which provides the burden of proof before the PCHB, Ecology has the initial burden of proving that there was a violation and the reasonableness of the penalty. M/V An Ping 6 v. DOE, PCHB No. 94-118 (1995); Gaydeski v. DOE, PCHB No. 96-10 (1996).

The PCHB, in determining the reasonableness of a penalty, may consider the nature of the violation, the previous history of the appellant, and the actions of the appellant to correct the problem, since the violation. Fletcher v. DOE, PCHB No. 94-178 (1995); Vanderhouwen v. DOE, PCHB Nos. 94-108, 94-146 & 94-231 (1997).

Forfeiture

Ecology bears the burden of proof on a relinquishment order. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

On appeal of a relinquishment order, Ecology has the burden of proving lack of beneficial use of the water for a period of five or more consecutive years. If such a showing is made, the burden shifts to the appellant to demonstrate "sufficient cause" for the non-use or that other exceptions in

RCW 90.14.140 apply. Faith Financial Services v. DOE, PCHB No. 81-70 (1981); Sheep Mountain Cattle v. DOE, PCHB No. 81-85 (1983); Norman v. DOE, PCHB No. 81-175 (1982); Motley-Motley, Inc. v. DOE, PCHB No. 96-175 (1997).

Ecology bears the burden of proof as to the basis for a Rescission Order and the Order to Initiate Relinquishment. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

Ecology bears the burden of proof as to abandonment. Where there is evidence of a long period of non-use, the burden may shift to the water right claimant to justify non-use. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000); Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997); Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Standing

In standing issues, the party asserting standing bears the burden of proof. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

Where the purpose of a changed water right was to improve the quality of drinking water, appellants must submit evidence establishing that changed water right would result in a lower quality of water for the appellants in order to meet burden of demonstrating injury for purpose of standing. Ironworkers Local 29 v. DOE, PCHB No. 01-007 (2001).

5. STATUTORY INTERPRETATION

When language is clear, the PCHB will not engage in statutory construction. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Chapter 90.44 RCW and implementing regulations are designed to prevent harm to the public interest. Strict compliance is required. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Although the court may substitute its judgment for that of the agency, the agency's view of the law is accorded substantial weight because of its expertise in administering a special field of law. Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

In interpreting a statute the PCHB must ascertain and give effect to the intent and purpose of the legislature, as expressed in the act, which must be construed as a whole. Effect should be given to all the language used and all of the provisions of the act must be considered in their relation to

each other and, if possible, harmonized to insure proper construction of each provision. Kuch v. DOE, PCHB No. 92-218 (1994).

RCW 90.14.190, which authorizes an attorney fee award under certain circumstances in actions challenging a decision of Ecology rendered under RCW 90.14, is construed strictly in accordance with its terms. Rettkowski v. DOE, 76 Wn. App. 384, 885 P.2d 852 (1994).

A court may not read into a statute language that the Legislature did not include. Rettkowski v. DOE, 76 Wn. App. 384, 885 P.2d 852 (1994).

The goal of statutory construction is to give effect to legislative intent. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

Ordinary terms used in a statute are generally given their common and ordinary meaning. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

When a statutory term is well known to the common law, the Legislature is presumed to have intended the term to mean what it was understood to mean at common law. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

Unambiguous statutes are not subject to judicial construction. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

The construction of a statute is a question of law which is reviewed de novo. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996); Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

An undefined term in an administrative regulation is given its ordinary meaning as may be found in a dictionary. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

No administrative interpretation or rulemaking is required to apply the plain language of the relevant statute. Packwood Canal v. DOE, PCHB No. 97-190 (1998).

A statute is construed so that no portion of it is rendered meaningless or superfluous. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The interpretation of a statute by an agency charged with its administration and enforcement is entitled to great weight by a reviewing court only if the statute is ambiguous. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Kim v. DOE, PCHB No. 98-213 (1999).

A statutory term that the statute does not define may be given its dictionary definition. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

When the statute being interpreted is an exemption to a general rule, the accepted rule of statutory construction is to construe such exemption narrowly, so as to give maximum effect to the policy underlying the general rule. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999); Kim v. DOE, PCHB No. 98-213 (1999).

The *ejusdem generis* rule of statutory construction provides: "Whenever a statute contains specific enumerations of power followed by words granting general powers, the specific enumerations govern the character or nature of the subject matter to be included within the words granting the general powers." Packwood Canal v. DOE, PCHB No. 98-228, 98-229, 98-230 (1999); Papineau v. DOE, PCHB No. 02-048 (2002).

The fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature. In so doing, first consideration is given to the context and subject matter of the statute itself. Moreover, legislative intent is to be ascertained from the statutory text as a whole, interpreted in terms of the general object and purpose of the legislation. Packwood Canal v. DOE, PCHB Nos. 98-228, 98-229, 98-230 (1999).

The interpretation of a statute by an agency charged with its administration and enforcement is entitled to great weight by a reviewing court only if the statute is ambiguous. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The courts have the ultimate authority to determine the meaning and purpose of a statute. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The interpretation of a statute by an agency charged with its administration and enforcement is not entitled to judicial deference if the agency interpretation conflicts with the statute. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The courts have the ultimate authority to determine the meaning and purpose of a statute. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The interpretation of a judgment or decree is a question of law. As in the construction of statutes, the PCHB will look to unambiguous terms in the decree to determine its intent. No factual evidence is warranted unless the subject decree is in fact ambiguous and factual evidence would be of assistance to the PCHB in interpreting the language of the decree. Maltais v. DOE, PCHB No. 00-131 (2000).

The meaning of a particular word or phrase in a statute "is not gleaned from that word alone, because [the PCHB's] purpose is to ascertain legislative intent of the statute as a whole." Kim v. DOE, PCHB No. 98-213 (1999); Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

Statutory construction is unnecessary when a statute is unambiguous. Kim v. DOE, PCHB No. 98-213 (1999); Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The purpose of a statute should prevail over express but inept wording. Kim v. DOE, PCHB No. 98-213 (1999); Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

A literal reading is to be avoided if it would result in unlikely, absurd or strained consequences. Kim v. DOE, PCHB No. 98-213 (1999); Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

In construing an ambiguous statute, the PCHB can look to legislative history, to the entirety of the statute, to the entirety of the legislation enacted, to the entirety of the water code, and to the interpretation of the administrative agency. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Legislative history ordinarily consists of committee reports, testimony by committee chairs, or even testimony by legislators who sponsored or supported the law. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Legislative history does not include contemporaneous reports of agencies or subsequent discussions of the alleged intent of the legislature. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

An ambiguity exists if the statute is subject to more than one reasonable interpretation. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

Where a statute is within the agency's special expertise, its interpretation is accorded great weight, provided the statute is ambiguous. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent determined within the context of the entire statute. Kim v. DOE, PCHB No. 98-213 (1999); Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The spirit and intent of the law should prevail over the letter of the law. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

Without benefit of legislative history, the PCHB looks to ascertain legislative intent from the language of the statute, from the entirety of the legislative enactment, and from other provisions of the water code. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

When a term is not statutorily defined, it is given its ordinary meaning unless that meaning is ambiguous. Papineau v. DOE, PCHB No. 02-048 (2002).

If, after examining the plain meaning of the statute, the statute is ambiguous, the PCHB may look to legislative history as a guide to the legislative intent. Papineau v. DOE, PCHB No. 02-048 (2002); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

No part of a statute should be deemed inoperative or superfluous unless the result of obvious mistake or error. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

The PCHB is charged with deciding legislative intent and when the statute is plain on its face, the PCHB should give effect to that plain meaning as an expression of the Legislature's intent. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Where the language of a statute is not ambiguous, the PCHB will not evaluate the legislative history to ascertain the legislative intent. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

6. AUTHORITIES

The PCHB recognizes that our courts have traditionally considered "well-established principles of western water law" in interpreting Washington law. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999); DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992); Okanogan Wilderness League v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997); Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

Where a superior court order in an adjudication is not an appellate decision, it does not provide precedent to the PCHB. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

Superior Court decisions are not binding on the PCHB. Statewide review provided by the PCHB is preferable to the fragmentation that could result from decisions produced by the various superior courts in the state. State v. Woodward, 84 Wn.2d 329, 333 (1974) (air pollution control context); Papineau v. DOE, PCHB No. 02-048 (2002).

C. PROCEDURAL REQUIREMENTS

1. RULES OF PRACTICE AND PROCEDURE

The PCHB's Rules of Practice and Procedure are contained in chapter 371-08 WAC. As amended, these rules reflect passage of both the Environmental Procedures Simplification Act of 1987 (chapter 109, Laws of 1987), and the revised Administrative Proceduress Act, effective July 1, 1989 (codified as at 34.05 RCW). The Rules were substantially modified in 1996.

The PCHB's rules require that a request for continuance be made by written motion, accompanied by a proposed order. The party moving for the continuance is to seek the stipulation of the other parties. Moreover, the clerk of the PCHB is to be consulted to ascertain an alternative hearing date which should be indicated in the proposed order. Theis v. DOE, PCHB No. 94-112 (1994).

The PCHB's rules allow the presiding officer to waive any non-jurisdictional rule for any party not represented by counsel to avoid manifest injustice. Theis v. DOE, PCHB No. 94-112 (1994).

Where an appellant fails to appear for hearing, and fails to request timely review and obtain a continuance, in accordance with WAC 371-08-165(1), such action is subject to dismissal under WAC 371-08-167(1). Pursuant to that rule, appellant has seven days from the service of the order of dismissal to file a written motion with the PCHB, with a copy served on the respondent, requesting the order be vacated, and stating appellant's grounds for the request. Theis v. DOE, PCHB No. 94-112 (1994).

Where the Order appealed is rescinded, the PCHB can provide no further relief to the appellants. When meaningful relief is no longer possible, the case is properly considered moot, and should be dismissed. Marlin Hutterian v. DOE, PCHB No. 02-061 (2002).

2. TIMELINESS

Jurisdictional Limits

Illness, hospitalization, age and unfamiliarity with the English language are extraordinary circumstances which can be taken into account in determining when an order is effectively "communicated to the appealing party" for purposes of commencing the appeal period. Laas v. DOE, PCHB No. 78-176 (1978).

The deadline for filing an appeal is jurisdictional. The PCHB is without authority to expand its jurisdiction or confer jurisdiction on equitable grounds. Spring Glen Mobile Home Estates v. DOE, PCHB No. 96-109 (1996).

An interested party must file an appeal within 30 days of the date on which the order was issued to establish jurisdiction before the PCHB. Otherwise, there is no right of appeal and the order is final. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

The PCHB lacks jurisdiction to hear appeals filed beyond the statutory 30-day appeal period. Haner v. DOE, PCHB No. 78-3 (1978); Williamson and Wheeler v. DOE, PCHB No. 78-153 (1979); Schurger v. DOE, PCHB No. 83-147 (1983); Land Development Sales v. DOE, PCHB No. 84-298 (1984); Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

The PCHB lacks jurisdiction over any appeal that is not timely filed. Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Tolling

The 30-day appeal period for a regulatory order does not start to run until appellant receives the order. Savaria v. DOE, PCHB No. 78-53 (1979) *overruled by* Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

The Court of Appeals held that RCW 43.21B.230 requires filing an appeal within 30 days of the date the notice or order is mailed to the appealing party. Wiseman v. DOE, PCHB No. 96-108 (1996).

The PCHB's previous rulings established that the time period within which to note an appeal of an Ecology order commenced on the date appellant received the subject order. That construction of RCW 43.21B.230 and the PCHB's rule implementing the same, WAC 371-08-180, were rejected in Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

For purposes of determining the timeliness of an administrative appeal under RCW 43.21B.230 to the PCHB, the 30-day appeal period begins on the date the notice of the underlying administrative decision is mailed to the appealing party. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

When the last day for filing an administrative appeal under RCW 43.21B.230 to the PCHB falls on a Saturday, the Saturday must be included in the time calculation in accordance of RCW 1.12.040. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996). (Saturdays are not included in computing time by subsequent amendment to RCW 1.112.040.)

The terms of a Report of Examination are no longer subject to challenge after the appeal period has expired. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996); Kison v. DOE, PCHB No. 01-044 (2001).

Under RCW 43.21B.230, which provides for appeals of administrative decisions to the PCHB, an aggrieved party that participated in the underlying administrative proceeding is not denied the right to appeal simply because the administrative agency failed to mail a notice of its decision to the party or delayed mailing of the notice. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996); Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

The fact that appellant was mailed a copy of a departmental decision does not confer a new 30-day period for an appeal to be filed with the PCHB. Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Timely filing requires filing a notice of appeal with the PCHB within 30 days from the date Ecology mails its final approval. Spring Glen Mobile Home Estates v. DOE, PCHB No. 96-109 (1996); Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Res Judicata /Collateral Estoppel

The doctrine of res judicata bars a later action when, between the two actions, there is an identity of: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons and parties for or against whom the claim is made. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

For purposes of the doctrine of res judicata, a dismissal with prejudice following the parties settlement of an action constitutes a final judgment. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The doctrine of collateral estoppel applies to prevent the re-litigation of an issue that was previously litigated and decided if: (1) the issue in both actions is identical; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party to, or was in privity with a party to, the previous action; and (4) no injustice will result from application of the doctrine. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The finality of judgments and certainty of the resulting rights are particularly important in water rights cases. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The party seeking to bar the re-litigation of an issue by means of the doctrine of collateral estoppel has the burden of proving the applicability of the doctrine. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

A party who had a full and fair opportunity to argue its position before a federal district court, a circuit court of appeals, and in a petition for a writ of certiorari in the United States Supreme Court cannot claim that application of the doctrine of collateral estoppel will result in an injustice. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The party seeking to bar the re-litigation of an issue by means of the doctrine of collateral estoppel has the burden of proving the applicability of the doctrine. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The doctrine of collateral estoppel may not be applied to bar the litigation of an issue that has not previously been heard and determined in an adjudicative proceeding. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The doctrine of res judicata bars an appeal where appellant did not appeal action of Ecology upon receipt of the Report of Examination but waited until the issuance of a superseding permit. Under Washington law, the doctrine bars a party from litigating claims, which were or should have been, litigated in a former action. Lake Entiat Lodge v. DOE, PCHB No. 01-025 (2001) .

3. SERVICE

Appeals to the PCHB must be filed with the PCHB and served on DOE within 30 days after receipt by the person appealing. RCW 43.21B.300, 310. Compare, however, Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d

144 (1996) (appeals must filed within 30 days of mailing by the department).

Under the PCHB's rules, "filing" and "service" have defined meanings. WAC 37108-032. Both filing with the PCHB and service on Ecology within the relevant thirty days have been held necessary to acquire jurisdiction. McVay v. DOE, PCHB No. 88-118 (1988). Service must also be made on others named as parties. WAC 371-08-085.

The PCHB will not dismiss for lack of timely service of appeal on Ecology on basis of mere allegation. Evidence must show failure to perfect appeal. East Hill Community Well Co. v. DOE, PCHB No. 79-96 (1979).

Notice by registered mail employed in the show cause phase applies also to an order of cancellation. Kuch v. DOE, PCHB No. 92-218 (1994).

When a statute calls for delivery by registered mail, delivery by certified mail with return receipt requested is the equivalent and is permitted. Kuch v. DOE, PCHB No. 92-218 (1994).

For purposes of an administrative appeal to the PCHB under RCW 43.21B.230, a party that attends public and private meetings associated with the underlying administrative decision and submits written input to the administrative decision-maker may be an interested party entitled to mailed notice of the decision. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

Applicant has the right to appeal an Ecology water right decision under RCW 43.21B.230, as long as appellant serves a copy of the notice of appeal to PCHB within the applicable time limits. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

4. FORM/SUFFICIENCY OF APPEALS

The form for appeals is outlined in RCW 43.21B.310 and is also set forth in the PCHB's procedural rules, WAC 371-08-075.

In general, appeals can be amended if they are defective or insufficient as a matter of form. WAC 371-08-100. Appeals can be challenged under CR 12(b)(6) for failure to state a claim upon which relief can be granted. Butler v. DOE, PCHB No. 86-36 (1986).

An appellate court may decline to consider an issue that is inadequately argued or unsupported by specific citations to legal authority. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

5. FEES

When a party aggrieved by a decision of Ecology rendered under 90.14 RCW challenges the decision in superior court and the court determines that Ecology's order was arbitrary, capricious, or erroneous, the party is entitled to recover its attorney fees under RCW 90.14.190 if it can show that it was injured by the order. The injury must be more than incurring legal fees. Rettkowski v. DOE, 76 Wn. App. 384, 885 P.2d 852 (1994).

For purposes of awarding attorney fees to a prevailing party under RCW 4.84.185, an action is not frivolous if two Justices of the Supreme Court would hold in favor of the non-prevailing party. Rettkowski v. DOE, 76 Wn. App. 384, 885 P.2d 852 (1994).

Costs to which a prevailing party is entitled under RCW 4.84.010 do not include attorney fees beyond statutory attorney fees (RCW 4.84.080). Rettkowski v. DOE, 76 Wn. App. 384, 885 P.2d 852 (1994).

The invasion of a legally protected interest by an order issued without statutory authority fulfills the injury element of RCW 90.14.190, under which attorneys' fees are awardable in actions challenging a water resource decision by Ecology if the party requesting attorneys' fees was injured by an arbitrary, capricious, or erroneous order of Ecology. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

An order issued by Ecology, based on various water resource statutes, to cease and desist pumping groundwater from a creek basin constitutes a "water resource decision" for purposes of RCW 90.14.190, under which attorneys' fees are awardable in actions challenging a water resource decision by Ecology if the party requesting attorney fees was injured by an arbitrary, capricious, or erroneous order of Ecology. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

The injury element of RCW 90.14.190, under which attorneys' fees are awardable in actions challenging a water resource decision by Ecology if the party requesting attorneys' fees was injured by an arbitrary, capricious, or erroneous order of Ecology, requires a showing of injury beyond the incurring of legal fees. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

The RCW 90.14.190 right to an award of attorneys' fees applies to any person aggrieved by a water resource decision of Ecology, provided all of the other statutory requirements are met. Rettkowski v. DOE, 128 Wn.2d 508, 910 P.2d 462 (1996).

Attorney fees may not be awarded to a prevailing party on the equitable basis that the party has incurred considerable economic expense to effectuate an important legislative purpose benefiting a large class of citizens (i.e., the "private attorney general" exception). Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997). Attorney fees may not be awarded as costs or damages to the prevailing party in an action unless the award is authorized by a statute, a contract, or a recognized ground of equity. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Attorney fees may not be awarded to a party in litigation against Ecology under RCW 90.14.190 if the proceedings did not produce an order or decision affecting water rights. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The PCHB does not have authority to order the payment of costs and attorneys fees absent express statutory authorization. Marlin Hutterian v. DOE, PCHB No. 02-061 (2002).

6. PROTESTS/STANDING

Generally

By law, RCW 90.03.280, an applicant for an appropriation permit must publish notice of the application. The form of the notice is prescribed by Ecology and includes a statement that protests may be filed with the agency in writing within 30 days of the last date of publication. Such protests are investigated by Ecology as a part of permit application processing and, in general, are responded to in the Report of Examination, which accompanies the agency's decision. See WAC 508-12-170. Notice and protest requirements for applications submitted to Water Conservancy Boards are provided in RCW 90.80.070 and RCW 90.80.080.

Once the agency's decision is made, the general law concerning standing to appeal to administrative adjudicative bodies governs standing to appeal to the PCHB. There is no requirement for the prior filing of a protest for a third-party to appeal an Ecology decision to the PCHB.

A lessee irrigator may have sufficient personal stake in the controversy to assert the lawfulness of the landowner's rights in defending against a cease and desist order. Pitts v. DOE, PCHB No. 85-146 (1986).

RCW 43.21B.230 is limited in scope to establishing the timeliness of an appeal and does not confer standing on a party simply because the party receives notice of a departmental decision. Thus a person who requests and receives notice of a departmental decision, but who is not an interested party aggrieved by that decision, is not conferred standing to

challenge the decision simply because Ecology has mailed a notice. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996); Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Standing is a jurisdictional issue. The PCHB cannot hear an appeal unless the parties before it have standing to pursue their claims. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

A citizen group's concerns about any precedent resulting from the agency's action does not grant it standing. A generalized, public interest is too remote to constitute standing. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

The person receiving notice of a departmental decision has standing to appeal only if that person is an aggrieved party that participated in the administrative proceeding. Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Burden of Proof

In standing issues, the party asserting standing bears the burden of proof. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Standing is a jurisdictional issue. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Appellant did not allege harm resulting from the grant or an application for change and therefore did not meet its burden in showing itself to be an aggrieved party. Center for Environmental Law and Policy v. DOE, PCHB No. 00-90 (2000).

Test for Standing -- General

A demonstration of standing is required on each claim made on appeal. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

A party asserting standing must meet three requirements to show standing: first, the appellant must suffer an "injury in fact;" second, the appellant's injury must come within the "zone of interests" protected by the statute at issue; and third, the PCHB must have within its legal power the ability to impose a remedy that will "redress" the injury. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

To establish standing, the appellants must show that they have suffered an injury in fact within the zone of interests protected by the statute and that the PCHB has authority to redress the injury suffered. Appellants must show that the action challenged (i.e. Ecology's permit decision) is the cause of the injury. Ironworkers Local 29 v. DOE, PCHB No. 01-007 (2001).

Test for Standing – Injury

To meet the injury in fact requirement for standing, either the appellant organization or one or more of its members individually must be injured in fact. The party must have suffered an invasion of a legally protected interest, one which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." In addition, the injury must be caused by the challenged action of an opposing party to the litigation. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

An "imminent" injury is one that is "certainly impending." Thus, mere intent to visit and use the affected locale is required. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

In addition to demonstrating an actual injury, to show standing a party must show that the injury suffered was caused by the government respondent to the litigation. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

Washington State cases addressing injury in fact are consistent with federal standing case law. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

To meet standing requirements, the appellant's interest must be threatened but the extent of the injury suffered need not be severe. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

An organization may establish standing if one of its members demonstrates an injury in fact. A member's interest in the wildlife of the region and its environs constitutes such an interest-even when the interest is exercised annually. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

To show injury in fact, an organization must demonstrate that its injury results from Ecology's actions, but the chain of causation need not be direct. Even an extended chain of causation between the government's act and the appellant's injury suffices to confer standing. Where an agency acknowledges that its action will operate to change flows on a river, that acknowledgement provides the requisite causal link for the organization to make out its injury in fact. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Purely environmental interests are enough to establish injury in fact. The PCHB applies standing principles more liberally where the parties bring straightforward environmental concerns. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Where the party seeking standing alleges the agency's action will increase out of stream uses and reduce instream flows thereby impairing an interest in wildlife and recreation values of a river, the alleged impairment, if proven, is sufficient to constitute an actual injury. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Test for Standing – Zone of Interest

The second standing requirement is the "zone of interest" requirement. To meet it, the appellant must show the interest it is seeking to protect through litigation is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

The requirement that an appellant's interest must be "arguably within the zone of interested to be protected or regulated by the statute or constitutional guarantee in question" is not a difficult requirement to meet. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

In the case of a trust water right, if Ecology's action impairs the public interest by reducing base flows, the organization's interest falls within the zone of interests protected by chapter 90.42 RCW for purposes of standing. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Test for Standing -- Remedy

The third and final standing requirement is that the tribunal deciding the case must be able to provide a remedy to redress the injury. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

7. PARTIES/INTERVENTION

The parties to an appeal are Ecology, the person to whom the agency decision is directed, and the appellant, if different from the person to whom the agency decision is directed. WAC 371-08-175.

Intervention by others may be granted, pursuant to the provisions of CR 24. WAC 371-08-106.

8. DEFAULT

Board rules (WAC 371-08-162) require dismissal when appellant fails to appear at scheduled hearing, absent showing of manifest injustice. Berg v. King County Water District No. 105 and DWR, PCHB No. 70-24 (1975); Wood v. DOE, PCHB No. 80-203 (1981); Choate v. DOE & Warner, PCHB No. 83-55 (1984); Morris v. DOE, PCHB No. 84-81(1984).

9. STAYS

Stays may be obtained from the PCHB pursuant to RCW 43.21B.320. The standards for determining whether a stay should issue are set forth in RCW 43.21B 320(3), as follows:

> "The applicant may make a prima facie case for stay if the applicant demonstrates either a likelihood of success on the merits of the appeal or irreparable harm. Upon such a showing, the hearings board shall grant the stay unless the department... demonstrates either (a) a substantial probability of success on the merits or (b) likelihood of success on the merits and an overriding public interest which justifies denial of the stay."

Stays are ordinarily sought in cases involving the issuance of an administrative enforcement order. In civil penalty cases, the penalty is not owed until appeal efforts have been unsuccessfully pursued. In permit cases, the permit is generally not issued until any appeal of Ecology's decision has been decided.

An appeal of a cease and desist order requesting a stay of enforcement may be rendered moot if Ecology stays its own order. Ballestrasse and Chaves v. DOE, PCHB No. 78-51 (1978).

On motion for a stay of an order to cease diversions, appellants showed likelihood of irreparable harm by demonstrating fire danger. W-I Forestry Products v. DOE, PCHB No. 87-218 (1988).

The cancellation of an appropriation permit is an exercise of police power for the public welfare and exempt from the automatic stay of the Bankruptcy Code. Case v. DOE, PCHB No. 89-114 (1990).

A party makes a prima facie case for a stay by demonstrating either a likelihood of success on the merits, or irreparable harm. The PCHB will grant a stay upon such a showing, unless Ecology demonstrates either a substantial probability of success on the merits; or a likelihood of success on the merits, coupled with an overriding public interest. RCW 43.21B.320(3); WAC 371-08-451(4); Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

Appellants showed irreparable harm from significant crop loss, and a likelihood of success on the merits, where they had ceased irrigating the lands that were the subject of a cease and desist order prior to Ecology's issuance of the order. Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

Ecology showed a substantial probability of success on the merits, and in the alternative, a likelihood of success on the merits, coupled with an overriding public interest, to defeat appellants' motion for stay from an order requiring installation of flow meters: Appellants' violation of the Water Code probably would not have occurred if meters had been installed prior to transfer of the right; installation of flow meters was a reasonable condition, designed to prevent any further similar wasting of public waters. Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

Ecology failed to show a substantial probability of success on the merits, or a likelihood of success, coupled with an overriding public interest to defeat a stay from a cease and desist order: Ecology failed to show that appellants did not have sufficient water for a proposed transfer where appellants had ceased irrigating the lands that were the subject of the order, thus removing the basis for Ecology's denial of the transfer. Further, while the decline of the water table in the area in question was of concern to the public, Ecology made no showing how granting the requested transfer would adversely impact groundwater resources beyond the impact of the certificated right. Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

The statute authorizing the PCHB to issue a stay also provides for judicial review of such a stay decision by the Superior Court for Thurston County pending the appeal on the merits before the PCHB. Airport Communities Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

A Stay Order of the PCHB is not a final decision for purposes of direct review by the court of appeals. Airport Communities Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

10. MOTIONS/DISCOVERY

Except where in conflict with the Board's rules, Washington statutes regarding pretrial procedure shall be followed. WAC 371-08-300. Special rules relating to pre-hearing procedures, use of civil rules, and discovery were repealed in 1996. This means that the motions typical of civil practice and the full arsenal of pre-trial discovery mechanisms are available to litigants before the PCHB. (WD)

Motions for summary judgment are explicitly authorized under RCW 43.21B.330. Also see WAC 371-08-450 (Motions). Special provision relating to summary judgment were repealed in 1996.

The PCHB will decline to entertain motions when adequate time to respond is not provided. Williams v. DOE, PCHB No. 86-63 (1986).

Motion to dismiss for failure to state a claim upon which relief can be granted or alternatively for summary judgment came too late when filed at the opening of the hearing on the merits. Williams v. DOE, PCHB No. 86-63 (1986).

Internal deliberations of Ecology on a permit application are privileged as part of the agency "mental process." This privilege however, may be waived by the conduct of the agency. Madrona Community v. DOE, PCHB No. 86-65 (1987).

If, on a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1997).

While an application may be entitled to consideration under the law in effect at the time it was filed, a change in scientific understanding is one of fact, not law. Moss, et al. v. DOE, PCHB Nos. 96-138, 96-156, 96-163, 96-166, 96-181 (1997).

In ruling on a motion for partial summary judgment, a court may not decide issues not raised in the motion. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Evidence proffered during discovery was based on the knowledge of the agency administering the groundwater in the area. As an administrator, the agency official charged with enforcement in the area was entitled to speak as to what might be considered expert opinion, based on his background described in his declaration. Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

An action may be dismissed under CR 12(b)(6) for failure to state a claim upon which relief can be granted only if the plaintiff cannot prove any set of facts that would justify recovery. In ruling on a motion to dismiss under CR 12(b)(6), a court presumes that the plaintiff's allegations are true and may consider hypothetical facts not in the record. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

11. SUMMARY JUDGMENT

On summary judgment, an appellate court applies the standard of CR 56(c) by engaging in the same inquiry as the trial court. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991); DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

Summary judgment is appropriate where the Appellants' sole challenge is to Ecology's statutory and regulatory authority to require installation of metering devices. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Summary judgment is a procedure available to avoid unnecessary trials on formal issues which cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. The party moving for summary judgment faces a heavy burden and must prove both the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

In determining whether there exists a genuine issue for trial, courts draw all reasonable inferences in the light most favorable to the non-moving party. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998); Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Summary judgment is inappropriate when all facts necessary to determine the issues have not been presented. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts or if all the facts necessary to determine the issues are not present. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

If disputes may be resolved as a matter of law, summary judgment is appropriate. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Summary judgment should be granted only where reasonable persons could reach but one conclusion. "If reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present, summary judgment is improper." Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Summary judgment is not appropriate when material facts regarding impairment and public welfare are in controversy. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

In ruling on a motion for partial summary judgment, a court may not decide issues not raised in the motion. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

A movant for a partial summary judgment may not raise new issues for the court's consideration in rebuttal materials submitted in reply to the nonmoving party's memorandum in opposition to the motion. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Summary judgment is appropriate if there is no genuine disputed issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994); Georgina Rich Trust, et al. v. DOE, PCHB Nos. 99-050, 99-054, 99-055, 99-056, 99-057, 99-058, 99-059 and 99-060 (2000); Anderville Farms, Inc. v. DOE, PCHB No. 00-62 (2000); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

In a summary judgment proceeding, the moving party has the initial burden of showing that there is no dispute as to any material fact. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002); Avalon Links v. DOE, PCHB No. 02-036 (2002); Moeur v. DOE, PCHB No. 02-097 (2002); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

In ruling on a motion for summary judgment, the PCHB must consider all of the material evidence and all inferences therefrom most favorably to the non-moving party and if reasonable persons might reach different conclusions, the motion should be denied. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Avalon Links v. DOE, PCHB No. 02-036 (2002); Moeur v. DOE, PCHB No. 02-097 (2002); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. Avalon Links v. DOE, PCHB No. 02-036 (2002).

Summary judgment can also be granted to a non-moving party when the facts are not in dispute. Avalon Links v. DOE, PCHB No. 02-036 (2002).

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. Avalon Links v. DOE, PCHB No. 02-036 (2002); Moeur v. DOE, PCHB No. 02-097 (2002); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. Papineau v. DOE, PCHB No. 02-048 (2002); Avalon Links v. DOE, PCHB No. 02-036 (2002); Moeur v. DOE, PCHB No. 02-097 (2002).

The PCHB does not have discretion to grant summary judgment where there is a genuine issue of fact. Moeur v. DOE, PCHB No. 02-097 (2002).

The PCHB has discretion to deny summary judgment where the complexity of the case or the public policy issues involved warrant hearing on the merits. Moeur v. DOE, PCHB No. 02-097 (2002).

The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Avalon Links v. DOE, PCHB No. 02-036 (2002); Moeur v. DOE, PCHB No. 02-097 (2002).

The trier of fact must construe the evidence and consider the material facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

There must also be sufficient undisputed facts in the record to support a legal conclusion in favor of a party. Moeur v. DOE, PCHB No. 02-097 (2002).

Where there are no genuine issues of material fact, legal questions raised on appeal are appropriate for resolution by summary judgment. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

12. NOTICE

Appellant did not receive either actual or constructive notice of an Order of Cancellation where appellant did not receive the letter notifying of cancellation, did not receive notice of the letter, and where his minor son with whom the letter was left was gravely afflicted at the time in question. Kuch v. DOE, PCHB No. 92-218 (1994).

Under former RCW 43.21B.190, a necessary party to an action for judicial review of a decision of the PCHB may be notified of the action by serving the petition for review on the party's attorney of record. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

Ecology had no obligation to otherwise provide notice of its decisions to neighboring property owners, where it had issued decisions to the water

right holders of record. There is no obligation on the part of Ecology to conduct a title search before issuing a water right decision. Lake Entiat Lodge Assoc. v. DOE, PCHB No. 00-127 (2000).

13. AMENDMENTS

An amendment that follows issuance of a permit necessarily would be of the permit, rather than of the application, where the appellant failed to file an amendment on the forms required by Ecology under WAC 508-12-180 prior to the issuance of the permit. Pariseau v. DOE, PCHB No. 92-142 (1993).

WAC 508-12-190(1) allows applicants or permittees to seek amendment of their application or permit, provided they utilize the procedure set forth in RCW 90.03.380. WAC 508-12-190(2) authorizes amendment to any permit, without affecting priority, "only after full consideration of the proposed changes in accordance with the provisions of RCW 90.03.290." Pariseau v. DOE, PCHB No. 92-142 (1993).

14. JUDGMENT AS A MATTER OF LAW

A motion for judgment as a matter of law on an issue may be granted only if it can be said, as a matter of law, that no evidence or reasonable inferences existed to sustain a verdict on that issue for the party opposing the motion. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

The evidence presented on a motion for a judgment as a matter of law must be viewed in the light most favorable to the non-moving party. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

The motion for judgment as a matter of law is comparable to a motion for summary judgment. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

15. AMICUS CURIAE

In ruling on a motion for amicus status, the PCHB evaluates whether the legal arguments being presented in the brief would assist the PCHB in deciding the case. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

16. EVIDENCE

Under RCW 34.05.558, the facts pertinent to review of administrative proceedings in most cases are those established at the administrative hearing. Den Beste v. PCHB, 81 Wn. App. 330, 914 P.2d 144 (1996).

Appellants' motion to strike was denied: Evidence proffered was based on the knowledge of the agency administering the groundwater in the area. As an administrator, the agency official charged with enforcement in the area was entitled to speak as to what might be considered expert opinion, based on his background described in his declaration. Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

WAC 371-08-500(1) allows the presiding officer to admit evidence which "is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." The presiding officer shall consider, but shall not be bound by the rules of evidence governing non-jury trials in superior court. WAC 371-08-500(1); Stahl Hutterian Brethren v. DOE, PCHB No. 00-80 & 82 (2000).

D. APPELLATE REVIEW

1. GENERALLY

Appellate courts review PCHB orders under the Administrative Procedures Act. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Relief may be granted where the agency's interpretation or application of the law is erroneous, the order is not supported by substantial evidence, or the order is arbitrary or capricious. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The court applies the standards of review in RCW 34.05.570(3) directly to the agency record. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

2. DIRECT REVIEW

The Administrative Procedures Act authorizes direct appellate review of final decisions of the PCHB: "(a) upon certification by the superior court pursuant to this section or (b) if the final decision is from an environmental board …, upon acceptance by the court of appeals after a certificate of appealability has been filed by the environmental board that rendered the final decision." RCW 34.05.518(1). Airport Communities

Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

The PCHB has thirty days in which to issue a decision on an request for Certificate of Appealability. The analysis by the PCHB prior to issuing a Certificate of Appealability is two pronged: (1) does the matter meet the criteria set forth in RCW 34.05.518(3)(b); and (2) does the stay decision of the Board qualify as a final decision. Airport Communities Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

Direct review is only available from a "final decision" of an administrative agency in an adjudicative proceeding. The Administrative Procedures Act does not specifically define "final order" but does identify an order as a written statement that "finally determines the legal rights, duties, privileges, immunities, or other legal interest of a specific person or persons." Airport Communities Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

A Stay Order of the PCHB is not a final decision for purposes of direct review of an appellate court. Airport Communities Coalition v. DOE, PCHB No. 01-160 (2002) (Denial Of Certificates Of Appealability).

II. BASIS FOR CREATING RIGHTS

A. COMMON LAW AND EARLY STATUTES

In Washington Territory both the riparian doctrine, based on ownership of land, and the prior appropriation doctrine, based on priority of physical use, were recognized as common law by the courts. After statehood, legislation was enacted in 1890 and 1891, based on the prior appropriation doctrine. The 1890 legislation called for persons who constructed ditches for irrigation water to file descriptive information with the county clerk after completion of construction. The 1891 act provided for a pre-construction notice of intent of irrigation appropriation to be posted on-site and filed within the county auditor. If work was thereafter done according to the notice, priority related back to the date of notice. (WD).

These early statutes did not supersede the common law methods of acquiring rights and, thus, are of modern interest primarily as the basis for the creation of documents which may have evidentiary value. (WD).

Absent a general adjudication, a notice of water right filed pursuant to the 1891 statute can be accepted to show the existence of a right, when there is no evidence that the appropriation was not completed. Riddle v. DOE, PCHB No. 77-133 (1978).

Notwithstanding the terms of a notice filed with the county auditor under 1891 statute, a claimed right will be held to have come into existence only to the limited extent of appropriation shown by the evidence to have been diligently completed. Huegenin v. DOE, PCHB No. 79-77 (1980).

Receipt of a patent to land from the federal government prior to statehood in and of itself conveyed no water rights. The existence of water rights for a particular parcel is a question of state law. Myers v. DOE, PCHB No. 84-183 (1986).

B. PRIOR APPROPRIATION

The acquisition of a right by appropriation, historically, required a physical taking of the water and application of it to some particular use, often remote from the point of diversion. Ownership of property adjacent to the source of supply had nothing to do with the creation of such a right. (WD).

The key feature of the doctrine of prior appropriation is entitlement according to priority of first use. Once application of the water to the intended purpose has occurred, the right acquired is potentially perpetual, but retention of the right requires continuous uninterrupted use. (WD).

Modern statutes relating to instream flows have somewhat blurred the historic idea of an appropriation as a man-made alteration of natural conditions. However, the concept of a physical taking of water is still useful in most private appropriation contexts. (WD).

In 1915, a water right could be perfected only by strict compliance with statutory requirements or by following community custom. The statute required (1) posting a notice of claim at the proposed point of diversion, (2) filing a copy of the notice with the county auditor, (3) commencing the work associated with the notice within prescribed times, and (4) diligently completing the work. Community custom required (1) an intent to appropriate, (2) implementation of that intent by an actual diversion of public waters, and (3) an application of the diverted water to a beneficial use within a reasonable time based upon the concept of due (or reasonable) diligence. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Prescription or adverse possession is not applicable to the public waters of the state. McLeary v. Department of Game, 91 Wn.2d 647, 591 P.2d 778 (1979); Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979); Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

C. RIPARIAN RIGHTS

At common law, riparian rights arose from the ownership of land traversed or touched by water. The rights, limited in scope by the concept of reasonableness, were applicable only to the riparian land and could not be used on non-riparian tracts. (WD).

These rights, inhering in land ownership, did not depend on use to come into existence. Thus, theoretically, unused riparian rights could be exercised at any time. (WD).

Reconciliation of the riparian rights doctrine and the doctrine of prior appropriation has been an on-going task for the Washington courts. Since the enactment of the appropriation-centered Water Code of 1917, riparian rights have taken on many of the attributes of appropriative rights and have, otherwise, declined in significance. (WD).

Diversionary riparian rights have a priority as of the date steps were first taken to sever riparian land from the public domain. Moreover, they have been subjected to the concept of use, so that non-use without "sufficient cause" for five consecutive years works a forfeiture. However, the primary importance of riparian rights at present is in the area of non-diversionary and non-consumptive use, such as recreation and aesthetics. These "in-place" riparian rights may be of considerable significance to owners of waterfront on "non-navigable" lakes. Bach v. Sarich, 74 Wn.2d. 575, 445 P.2d 648 (1968).

Riparian rights in Washington are limited to those rights that were exercised by riparian owners prior to 1932. Significant as consumptive uses in this category are early-acquired rights for stock to drink from streams. In Re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970).

Diversionary riparian rights not initially exercised within 15 years of the enactment of the Water Code of 1917 have been lost. DOE v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985).

For a general discussion of the law of riparian rights in Washington prior to the Abbott decision, see Mackenzie v. DOE, PCHB No. 77-70 (1979).

Riparian rights may consist of recreational rights, such as fishing, boating or swimming. No riparian right to withdraw water from a lake and use it consumptively can arise from uses initiated after 1932. Myers v. DOE, PCHB No. 84-183 (1986).

Riparian rights have never existed in Washington for property adjacent to navigable waters. The function performed by rights of riparian ownership

on "non-navigable" waters is largely performed on navigable waters by the public trust doctrine. Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989 (1987).

RCW 90.14.068 allows only those water users claiming a right to withdraw or divert water to file a claim. The statute does not apply to riparian rights that do not diminish the quantity of water remaining in the source such as . . . aesthetic uses. RCW 90.14.020(5). In addition, the legislature has not defined beneficial use to include aesthetic uses for purposes of the Claims Registration Act. RCW 90.14.031. Price v. DOE, PCHB No. 98-224 (1999).

D. COMMON LAW GROUNDWATER RIGHTS

At common law, groundwater usage was governed by the notion that a landowner had the right to use water underlying his land, limited by a concept of reasonableness - a doctrine akin to the riparian rights doctrine. Washington Attorney General Opinions, 1984 (No. 19).

The Groundwater Code was adopted subject to existing rights. Among such existing rights may be correlative rights in groundwater. Correlative rights arise as an indicia of real property ownership. The correlative right is akin to a riparian right applied to groundwater. There is no reported decision on the reasonable time period (or even if there is a reasonable time period) within which such rights must be put to beneficial use following the effective date of the Groundwater Code. However, such rights must have been established prior to June 7, 1945, the effective date of the Groundwater Code. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

Correlative rights claims, as a matter of law, should be accepted for filing in the claims registry under the 1997 opening. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

To be a valid correlative claim, the claim must state that water was first put to use prior to 1945. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

E. THE PERMIT SYSTEM

The Water Code of 1917 declares: "Subject to existing rights all waters of the state belong to the public." From this foundation, the code establishes a permit system as the exclusive method for acquiring surface water

rights. The permit system is based on the doctrine of prior appropriation. The rule that the "first in time shall be the first in right" is enshrined in RCW 90.03.010. In 1945, the Groundwater Code extended the prior appropriation-based permit scheme to groundwater. RCW 90.44.040 - RCW 90.44.050.

For both surface and groundwater, essential criteria for permit issuance are contained in RCW 90.03.290, as follows:

> "Ecology shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit . . ."

The issuance of a permit to appropriate is a discretionary act in the exercise of the state's police power. Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979); Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Water rights cannot be acquired against the state by prescriptive use. McLeary v. Department of Game, 91 Wn.2d 647, 591 P.2d 778 (1979); Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979); RCW 90.14.220.

That the source of water is on an applicant's property or that the property was acquired under the homestead laws prior to passage of the water code is not relevant to the cancellation of a permit sought pursuant to the water code. Ellis and Hunter v. DOE, PCHB No. 82-190 (1983).

Ecology's decision on a permit is not a matter of applying fixed quantitative standards. Within the statutory standards, there is room for the agency to exercise expert judgment. Whitebluff Prairie Coalition v. DOE, PCHB No. 86-5 (1986).

The water codes are designed to prevent new appropriators from buying into trouble. All uses could simply be regulated on the basis of priority. When there was not enough water to go around, those who guessed wrong would just have to suffer the consequences. The permit system is intended, to the extent possible, to head off such problems before they occur. In large measure the state water agency's function is prevention, not enforcement. Black Star Ranch v. DOE, PCHB No. 87-19 (1988).

Ecology's permitting function invariably involves a degree of prediction using data that is not totally complete. It is a delicate task to determine when there is enough information to allow decisions which minimize

perceived risks. The choice essentially is a matter of discretion. Black Star Ranch v. DOE, PCHB No. 87-19 (1988).

RCW 90.03.290, as made applicable to groundwater appropriations by RCW 90.44.060, requires Ecology to make four determinations prior to issuance of a water use permit: 1) what water, if any, is available; 2) to what beneficial uses the water is to be applied; 3) will the appropriation impair existing rights; and 4) will the appropriation detrimentally affect the public welfare. Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973); Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

The state's permitting system is an exercise of the state's police power. Thurlow v. DOE, PCHB No. 90-235 (1991).

Principles of agency are inapplicable in the Water Code's statutory framework. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Water rights in the state are governed by the doctrine of appropriation, not contract law. An irrigation district's power to adopt equitable rules for water distribution is limited by the principle of first in time is first in right. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

RCW 90.03.250 establishes the basic requirement that any person seeking to appropriate water for a beneficial use must apply to Ecology for a permit. No waters are to be diverted for the proposed uses until the permit has been obtained. Stenback v. DOE, PCHB No. 93-144 (1994).

The permit decision involves the exercise of discretion, which the Legislature has assigned to Ecology's good judgment. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

To constitute a valid appropriation of water, creating a vested, private water right, three elements must always exist: (1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use. Theodoratus v. DOE, PCHB No. 94-218 (1995), DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The following principles are present in the Water Code of 1917, chapter 90.03 RCW, which governs groundwater appropriation pursuant to RCW 90.44.060. An application for water must be filed with Ecology, which shall investigate to what beneficial use or uses it can be applied. A permit may then be issued stating the amount of water to which the applicant

shall be entitled and the beneficial use or uses to which it may be applied. Ecology is forbidden to grant a permit for more water than can be applied to beneficial use. Once the appropriation has been perfected pursuant to the Water Code, Ecology has the duty to issue a certificate of water right. The priority vests when the right has been acquired by appropriation. Theodoratus v. DOE, PCHB No. 94-218 (1995), appealed DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998);.

The PCHB reviews denials of water right permit applications de novo. Cheney v. DOE, PCHB No. 96-186 (1997).

The appellant bears the burden of proving that the water right application meets the four criteria of RCW 90.03.290. Cheney v. DOE, PCHB No. 96-186 (1997).

Because new water rights, if perfected, exist in perpetuity, the state Water Code requires Ecology to investigate any new application to protect existing water rights from impairment. Strobel v. DOE, PCHB No. 96-52 (1997).

chapter 90.03 RCW does not contemplate permitting all requested uses and then requiring Ecology to regulate them on the basis of priority to prevent junior rights from impairing senior ones. The permitting system is designed to head off regulatory problems inevitable if new rights are granted that must be interrupted to service senior ones. Strobel v. DOE, PCHB No. 96-52 (1997).

The Water Code was adopted subject to existing rights. Pre-code inchoate water rights survived the enactment of the Water Code as long as the subject water was put to beneficial use within a reasonable period of time. A reasonable period of time is considered to be 15 years. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

Since 1917, a new surface water right can only be acquired if the procedures outlined in chapter 90.03 RCW are followed. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

Unless the procedures contained within RCW 90.03.380 are used, neither the PCHB nor Ecology has the authority to allow a water right to be expanded beyond the original intent of the appropriator. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

All waters of the state are public waters and subject to appropriation for beneficial use under the processes set forth in the state Water Code.

Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The Water Code is intended to be a complete system for the distribution and regulation of the waters of the state. Neither the PCHB nor DOE can create an exemption in the water code that is not expressly set forth by the legislature. Kim v. DOE, PCHB No. 98-213; Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The capture of stormwater absent beneficial use does not require a water right. However, where the capture of stormwater is a beneficial use, as defined by the water code, it does require a water right. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

F. WATER RIGHTS CLAIMS

Chapter 90.14 RCW established a five-year period (ending June 6, 1974) for the filing with Ecology of claims of right "to withdraw or divert and make beneficial use of public surface or groundwaters of the state." RCW 90.14.041

Water rights based on a state-issued permit or certificate were exempted from the registration requirements. RCW 90.14.041. This exemption, thus, covered not only all rights acquired through the statutory permit systems (commencing in 1917 for surface water, and in 1945 for groundwater), but also all rights confirmed in general adjudications commenced before the registration period closed. RCW 90.14.068. RCW 90.03.240 provides for the issuance of Certificates following entry of a decree of adjudication. See also RCW 90.44.090 and RCW 90.44.220. (WD).

Absent the possession of an appropriation permit or Certificate, the effect of a failure to register is relinquishment of any right. RCW 90.14.071.

Since the original deadline, the registration period has been legislatively reopened and reclosed for short periods. The most recent claims registratio period was from Sept. 1, 1997 through June 30, 1998. During these periods, the PCHB was assigned a certification function for claims. In general, the PCHB performed this function by reference to the documents submitted and did not look beyond the face of the submittals. RCW 90.14.043.

Where permit approval is challenged on the basis of prior rights to the source evidenced by a registered claim, Ecology and the PCHB must make

a tentative evaluation of the validity of the claim. Anderson & Assocs. v. DOE, PCHB No. 81-76 (1983).

In reopening the claims registration period briefly, Chapter 435, Laws of 1985, was not to affect or impair any "water right" existing prior to July 28, 1985. The term "water right" as used was intended to apply to traditional proprietary rights, not to minimum instream flows established by regulation. Wenatchee-Chiwawa Irrigation District v. DOE, PCHB No. 85-215 (1986).

Absent a state issued appropriation permit or certificate, any person claiming a diversionary right is conclusively presumed to have relinquished the right, if no statement of claim was filed during the statutory period provided by chapter 90.14 RCW. Filings made outside of the statutory period cannot constitute substantial compliance. W-I Forestry Products v. DOE, PCHB No. 87-218 (1988).

Under Washington's statutory scheme, no water right can exist unless evidenced by a permit or certificate or unless the subject of a Registration Act claim. Logandale Water Assoc. v. DOE, PCHB No. 89-22 (1989).

The doctrine of substantial compliance applies to water right claims. Under the doctrine of substantial compliance, a claimant meets the requirements of the statute by establishing the filed claim form means more than what is disclosed on the face of the document. An applicant is not entitled to enlarge a water right under the doctrine of substantial compliance. Fletcher v. DOE, PCHB No. 94-68 (1994).

The evidence of a pre-1917 water right acceptable in law is limited by the legislative enactment that all persons using or claiming the right to withdraw or divert to make beneficial use of public surface or groundwaters of the state, shall file with Ecology, not later than June 30, 1974, a statement of claim for each water right asserted on a form provided by Ecology. This enactment shall not apply to any water right based on a permit or certificate issued by Ecology or one of its predecessors. Deatherage v. DOE, PCHB No. 93-264 (1994).

Neither the hardship of predecessors in title nor misinformation concerning claims published by Ecology is an excuse for failure to file a claim. Deatherage v. DOE, PCHB No. 93-264 (1994).

Failure to file a claim operates as a conclusive waiver and relinquishment of any water rights that may have been held by the affected person. Deatherage v. DOE, PCHB No. 93-264 (1994).

The determination of validity required under RCW 90.03.380 is tentative only with respect to rights based on a claim arising before the 1917 Water Code. To find the claim is valid, there must be evidence of a claim predating the effective date of the Water Code in 1917 and evidence of beneficial use before the effective date of the Water Code or the exercise of due diligence thereafter to put the claimed water to beneficial use. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

A disagreement with the exclusion created by RCW 90.14.068(5), the claims registration act, is properly characterized as a facial attack on the constitutionality of the statute and, as such, falls outside the PCHB's jurisdiction. Packwood Canal v. DOE, PCHB No. 97-190 (1998).

Where water right claims assert a right for "all percolating waters, seepage or return flows from surface sources" put to beneficial use by subscribers of the appellant irrigation districts, the claims relate to surface waters. Alternatively, even if the subject waters may be characterized as groundwater, the appellants' rights therein would be limited to the extent of their water rights currently subject to adjudication in Yakima River proceeding. In either case, Ecology properly denied filing of the claims under RCW 90.14.068. Union Gap Irrigation District v. DOE, PCHB No. 98-263 (1999).

Given that the law unambiguously limits the filing period to June 30, 1998, Ecology properly rejected the claim for the additional two new water rights when the claims were filed 5 months after the statutory deadline. Lummi Island Land Co. v. DOE, PCHB No. 98-268 (1999).

RCW 90.14.068 is unambiguous in allowing only those water users that claim a right to withdraw or divert water to file a claim. The legislature has specifically indicated that the statute does not apply to riparian rights that do not diminish the quantity of water remaining in the source such as . . . aesthetic uses. RCW 90.14.020(5). In addition, the legislature has not defined beneficial use to include aesthetic uses for purposes of the claims registration act. RCW 90.14.031. Price v. DOE, PCHB No. 98-224 (1999).

RCW 90.14.041 does not apply to claims for exempt groundwater use. Harder Farms v. DOE, PCHB No. 98-132 (1999).

Allowing a change in the source of a claim conveys much broader authority for amendment than the specifically identified terms and conditions specified in RCW 90.14.065(1) and (2). It would be inconsistent with the structure and context of these provisions and the recognized tenants of statutory construction to interpret the phrase "ministerial in

nature" broadly enough to encompass a change in the source of a water right. Packwood Canal v. DOE, PCHB Nos. 98-228, 98-229, 98-230 (1999).

RCW 90.14.065(1) allows correction of an error in the quantity of the water right, if the applicant provides reasons for the failure to claim such right in the original claim. Packwood Canal v. DOE, PCHB Nos. 98-228, 98-229, 98-230 (1999).

A change in circumstances, not foreseeable at the time the original claim was filed, can form the basis for an amendment under RCW 90.14.065(2), but only if the change in circumstances relates to the manner of transportation or diversion of the water and not to the use or quantity of such water. Packwood Canal v. DOE, PCHB Nos. 98-228, 98-229, 98-230 (1999).

The Registration Act, RCW 90.14.010 et seq., was adopted in 1967 to address the confusing patchwork of water right claims and rights that exist under Washington law. Pursuant to the Registration Act, any person claiming a right to use waters of the state was required to file a statement of claim for the right. Under the Act, the consequences for failing to file a claim are severe. The Registration Act provides, that any such person "shall be conclusively deemed to have waived and relinquished any right, title, or interest in said right." The initial claim registration period closed on July 1, 1974. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

To be a valid correlative claim, the claim must state that water was first put to use prior to 1945. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

Acceptance of speculative claims would only add more uncertainty to the status of existing rights, which is counter to the express purposes of RCW 90.14. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

Ecology has the right to reject claims that do not substantially comply with RCW 90.14.051. RCW 90.14.111 explicitly limits claims that may be filed in the state registry, as those "set forth pursuant to RCW 90.14.041, 90.14.051 and 90.14.061." Claims which fail to quantify or locate the point of withdrawal of the water do not substantially comply with RCW 90.14.051(3), (4) and (5). Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143,

98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

The claims registry was reopened for a brief period in 1985. The 1985 opening required an application to the PCHB for certification of a claim. Any certification by the PCHB required a finding that "waters of the state have been applied to beneficial use continuously (with no period of nonuse exceeding five consecutive years) in the case of surface water beginning not later than June 7, 1917, and in the case of groundwater beginning not later than June 7, 1945." Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

The third and current claims registry opening did not require certification by the PCHB. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

Correlative rights claims, as a matter of law, should be accepted for filing in the registry under the 1997 opening. Welch, et al. v. DOE, PCHB Nos. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233, 98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258 (2000).

A statement of claim filed with the claims registry is meant to encompass the entire water right filed by the claimant. Papineau v. DOE, PCHB No. 02-048 (2002).

DOE is entitled to rely upon the finality of a filed statement of claim when it makes a determination regarding the availability and use of water within a watershed. Papineau v. DOE, PCHB No. 02-048 (2002).

The filing of a statement of claim, similar to many other legal documents, is a recognition that certain rights require protection. Papineau v. DOE, PCHB No. 02-048 (2002).

The claimant has an obligation to provide the correct information when filling out the claim form. Papineau v. DOE, PCHB No. 02-048 (2002).

RCW 90.14.065(3) allows amendments that are ministerial in nature. "Ministerial in nature" must be read in a narrow manner. Papineau v. DOE, PCHB No. 02-048 (2002).

When the term "ministerial" is given its ordinary meaning within the context of the statute, it is clear that mistakes in judgment are outside the scope of the definition. "Ministerial" is therefore necessarily limited to clerical or typographical errors by its ordinary meaning within the context

of the statute. If a mistake is apparent from looking at the face of the document, then most likely this will constitute a mistake that is "ministerial in nature." Papineau v. DOE, PCHB No. 02-048 (2002).

G. FAMILY FARM WATER ACT

The Family Farm Water Act was approved by the voters as Initiative 59 in November of 1977, and became effective on December 8, 1977. It is codified as chapter 90.66 RCW. Under the act, rights to irrigate family farms cannot be limited as to time. A "family farm" was formerl defined as no more than 2,000 acres in the state under a single ownership irrigated under rights acquired after December 8, 1977. It is now defined as no more than 6,000 acres in the state irrigated under rights acquired after 1977 by a "person" with a controlling interest in no more than 6,000 acres of irrigated agricultural lands in Washington. The definition of a person qualified to exercise such rights includes corporations or partnerships; the statute also provides for interest held in trust. The Legislature substantially amended the statute in 2001 to allow for changes in use "consistent with adopted land use plans" in urban areas, and "to allow family farms of large enough size to be economically viable" in nonurban areas. RCW 90.66.065.

Under the Family Farm Water Act, a provision conditioning the entitlement to use water in perpetuity on continuing conformity with the definition of a "family farm" is lawful. Mercer Ranches v. DOE, PCHB No. 78-198 (1979).

The Family Farm Water Act was adopted by the voters through the approval of Initiative Measure No. 59 in 1977. The Legislature amended the Act in 2001. Laws of 2001, ch. 237. Amendments to the Act includes a requirement that changes to the place of use of a family farm water right must remain within the WRIA. RCW 90.66.065(5). High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

Notwithstanding the savings clause in RCW 90.66.065(6) (Family Farm Act) which provides that nothing in the Family Farm Act transfer provisions shall be construed as limiting "the authority granted by RCW 90.03.380, 90.03.390, or 90.44.100 to alter other elements of such a water right," a Family Farm Act water right can only be changed if the new place of use is within same the WRIA or UGA. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

The use of the word "and" in RCW 90.66.065(1) (Family Farm Act transfer provisions) indicates that the Legislature intended to require someone requesting to transfer a family farm water right to meet the requirements

of both this section of the law and the other listed provisions of the water code. High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

H. WATER RIGHTS ADJUDICATION

A general adjudication is a kind of quiet title action conducted by the Superior Court for the purpose of determining who is entitled to divert waters from a stream or to make withdrawals from a groundwater aquifer. RCW 90.03.110-.245. The proceedings establish the priority of each right, as well as its place of use, rate of instantaneous withdrawal and absolute annual quantity. (WD).

All claimants to rights in a source must submit proof of the physical acts which occurred historically in the right perfection process. Each claimant has the opportunity to contest the claims of others. Failure of a claimant to appear in the adjudication results in loss by default of any rights he or she might have been able to prove. (WD).

The critical function of adjudications has been to establish and quantify rights created prior to the establishment of the surface and groundwater permit systems with their detailed record keeping. (WD).

Where no general adjudication has been held, Ecology must make its best judgment about the extent and nature of existing rights in processing permit applications for new appropriations in an area. (WD).

In the permit issuing process, Ecology does not adjudicate existing rights based on claims of use pre-dating the 1917 Water Code. Jurisdiction for establishing rights based on such claims is in Superior Court. RCW 90.03.110 - 240. Grimes v. DOE, PCHB No. 70-10 (1971).

The examination of the effects an appropriation permit will have on existing rights is not an adjudication of those rights, but a test of the merits of the application. Ecology has jurisdiction and is required by RCW 90.03.290, to make such an examination. Scheibe v. DOE, PCHB No. 36 (1972).

The determination required by the water code of whether a proposed appropriation would impair existing rights is "tentative" and not adjudicative of existing rights. Funk v. Bartholet, 157 Wash. 584, 289 Pac. 1018 (1930); Mack v. Eldorado Water District, 56 Wn.2d 584, 354 P.2d 917 (1960); Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

The pendency of a general adjudication can provide an excuse preventing the forfeiture of a right for non-use. Attwood v. DOE, PCHB No. 82-58 (1983).

It is appropriate to hold applications for new rights in abeyance during the pendency of general adjudication. The delay is inconvenient but not unlawful. Perrow v. DOE, PCHB No. 84-244 (1985).

Any rights which existed prior to the adjudication and entry of the decree are extinguished by entry of a decree which fails to award those rights. Thurlow v. DOE, PCHB No. 90-235 (1991).

A general adjudication of water rights pursuant to chapter 90.03 RCW necessitates that all water claimants be joined in a single action in superior court to determine their rights and priorities to the water. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

A general adjudication of water rights pursuant to RCW 90.03.110 et seq. is a special form of quiet title action for the purpose of determining and confirming all existing rights to the use of water from a specific body of water, regardless of whether the rights are riparian or appropriative and regardless of when they were acquired. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

A general adjudication of water rights pursuant to RCW 90.03.110 et seq. cannot reduce, enlarge, or modify existing water rights, whether riparian or appropriative. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Any conflict between existing rights must be resolved by a general adjudication pursuant to the Water Code. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994).

Upon completion of the Yakima River adjudication, the federal government intends to withdraw any uncommitted water to enhance flows and support instream values in the Yakima system. Thus any water which is now permitted for withdrawal would directly reduce the flows in the Yakima and the Columbia. City of Ellensburg v. DOE, PCHB No. 96-194 (1996).

Ecology may not prioritize existing rights absent a general adjudication. Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997).

A general adjudication of water rights under RCW 90.03.110-.245 is a special form of quiet title action that determines all existing rights to the use of water from a specific body of water. A general adjudication may

not be used to lessen, enlarge, or modify existing water rights. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A water right may not be confirmed in a general adjudication of water rights under RCW 90.03.110-.245 unless the trial court makes a finding of fact that the specified quantity of water has been put to a beneficial use. A water right may not be confirmed on the basis of a prior allocation or the carrying capacity of the user's system absent a finding that the allocation or quantity of water the system can carry has been put to a beneficial use. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A trial court presiding over a general water rights adjudication under RCW 90.03.110-.180 does not have the authority to classify a party's water right as "standby/reserve" so as to protect the entitlement from future challenges of nonuse. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A court conducting a general water rights adjudication under RCW 90.03.110-.245 may condition the water rights of an irrigation district that are appurtenant to the irrigable acreage within the district's jurisdiction upon any future reclassifications of irrigable acreage made according to federal law. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

Neither DOE nor the PCHB has the authority to adjudicate water rights. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000) followed in Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

I. FEDERAL RESERVED RIGHTS

Rights derived from federal law reserving water for Indians must be recognized as "existing rights" by the state under RCW 90.03.010. These include rights acquired through succession to the interest of an Indian allottee. Pitts v. DOE, PCHB No. 85-146 (1986).

The power of the state extends only to regulation of the use of waters surplus to waters within a federal reserved right. Thus, the question of the legality of a change in point of diversion of a use derived from a reserved right is a question of federal rather than state law. Pitts v. DOE, PCHB No. 85-146 (1986).

Only federal agencies and those entities with whom they contract have authority to make decisions regarding the distribution of water within a federal irrigation project. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

State courts have jurisdiction to determine the extent of an Indian tribe's water rights impliedly reserved in a treaty with the United States. The courts apply federal law to make such a determination. DOE v. Yakima Reservation Irr. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993).

The PCHB has clear statutory jurisdiction under RCW 43.21B.110 to review water rights decisions made by Ecology. Examining impairment of senior water rights must be done under RCW 90.03.290, by Ecology, in the first instance, and by the PCHB on appeal. The PCHB can consider the state law issue of impairment without quantifying or adjudicating the amount of the Yakama Nation's treaty rights. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

III. ATTRIBUTES OF RIGHTS

A. NATURE OF PROPERTY INTEREST

1. GENERAL

Once an appropriation is perfected, the right that comes into existence is a real property interest of potentially infinite duration. It is a usufructory right, appurtenant to the land on which it is used, but subject to loss by abandonment or forfeiture for non-use. (WD).

An appropriative right arises from water use rather than ownership of land. Ownership of the affected land is not required of applicants. Wedrick v. DOE, PCHB No. 823 (1975).

A permit authorizes the withdrawal of public groundwater at a particular geographic location. It does not authorize access to that location over the private land of another, nor the placement of equipment on the private land of another. Access issues are inherently private matters to be resolved by private action or agreement. Brownell v. DOE and Williams, PCHB No. 78-197 (1979).

Once a given quantity of water has been appropriated, the right to that water becomes appurtenant to the land and continues in perpetuity to the exclusion of any other claimants. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

Once a holder of a water right diverts water and brings it under control and possession, the holder of the water right owns the water as personal property. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

A holder of a permit to appropriate water has a vested property interest in its water right to the extent that the water is beneficially used. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

Property owners have a vested interest in their water rights to the extent that the water is beneficially used on the land. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Supplemental water rights can only be used where the primary right goes unfulfilled. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994).

A water right is composed of two elements: (1) the amount of water that may be put to beneficial use and (2) its priority relative to other water rights. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993); DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A water diversion certificate issued to an irrigation district that specifies as the land appurtenant to the water right the total number of irrigable acres within the district's jurisdiction satisfies the land appurtenant requirement of RCW 90.03.240. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

The nature of a water right is that it is a continuous entitlement, so long as it is beneficially used. Willows Run Golf Course v. DOE, PCHB No. 00-160 (2001).

The classic elements of a water right include instantaneous and annual quantities and season of use. RCW 90.03.260, .290; DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The instantaneous quantity of a water right is a peak rate, not an average rate. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002).

2. CERTIFICATES

Certificates of water right are issued by Ecology after a right is perfected and proof of appropriation has been made. RCW 90.03.330, RCW 90.44.080. The Certificate evidences the acquisition of a right which has become a real property interest relating to the land. RCW 90.03.380.

3. PERMITS AND APPLICATIONS

Water rights applications and permits are a type of personal property interest. Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933); Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983). Permits are sometimes spoken of as "inchoate rights." (WD).

Rights to groundwater under a permit attach to the applicant and not the land. Thus Ecology erred in canceling a permit to a lessee of land at the instance of the lessor. Haase v. DOE, PCHB No. 768 (1975).

Property rights associated with the use of water become appurtenant to the land only after an appropriation is perfected. Permits and permit applications are personalty and must be assigned separately to be transferred. Stout v. DOE, PCHB No. 89-99 (1990).

That a landowner is in bankruptcy does not entitle a lessee who holds an appropriation permit to a stay of its cancellation. The permit is personalty and not property in which the landowner-lessor has any interest. Case v. DOE, PCHB No. 89-114 (1990).

The state's permitting system is an exercise of the state's police power. Thurlow v. DOE, PCHB No. 90-235 (1991).

RCW 90.03.320 requires Ecology to cancel a permit if the water is not appropriated for beneficial use. City of Ellensburg v. DOE, PCHB No. 96-194 (1996).

Once a given quantity of water has been appropriated, the right to that water becomes appurtenant to the land and continues in perpetuity to the exclusion of all subsequent claims. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Ecology properly considered the cumulative impact of such relatively small diversions and exempt wells on water quality in denying an application for new water right. Strobel v. DOE, PCHB No. 96-52 (1997).

No statutory vesting provisions exist in the context of water right applications, nor is there any Washington case law applying the "vested rights doctrine" to water right applications. DOE must apply the law in effect at the time it makes a final determination upon the application, rather than the law in effect at the time the application was filed. Stempel v. Dep't of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973); DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993); DOE v. Abbott, 103 Wn.2d 686, 697, 694 P.2d 1071 (1985); High Dunes Vineyard v. DOE, PCHB No. 01-189 (2002).

4. FOREIGN WATER

Water abandoned by its owner in a foreign watershed may be used by the first person who takes it. It is not necessary that the taker keep the water in that watershed. There are no prescriptive rights in such water, i.e., no priority is acquired by being a "first taker" in previous years. Dodge v. Ellensburg Water Co., 46 Wn. App. 77, 729 P.2d 631 (1986).

5. STORMWATER

Stormwater is a public water resource and therefore constitutes water of the state. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The capture of stormwater absent beneficial use does not require a water right. However, where the capture of stormwater is a beneficial use, as defined by the water code, it does require a water right. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

Capture of stormwater for use as low flow augmentation requires a water right because it is materially different under the law from familiar stormwater management activities. Stormwater infiltration facilities *per se* do not fall within this rule. Although such facilities may as an incident of their function enhance base flows, they are not purposefully designed and required to create an instream flow right in perpetuity. Where there is a diversion and impoundment system combined with the subsequent application of water to a beneficial use, management of stormwater becomes an appropriation triggering water code requirements. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

B. PERFECTION / DUE DILIGENCE

1. GENERAL

An appropriation does not ripen into a real property interest appurtenant to the land until the water is actually applied for the first time to the intended use. The process of constructing the necessary works and completing the actual use of the water for the intended purpose is termed "perfection" of the water right. (WD).

At common law, perfection was required to be accomplished with "due diligence," meaning that the project could not be deferred for an

unreasonable length of time. This requirement has been codified in RCW 90.03.320, through which Ecology establishes a schedule for construction and for applying the water to the beneficial use prescribed in the permit. Failure to adhere to this schedule or to obtain an extension can result in cancellation of a permit.

Appropriation of water does not necessarily require a diversion or impedance of flow where unnecessary to achieve the beneficial purpose for which water is to be applied. Bevan v. DOE, PCHB No. 48 (1972).

Desire to improve economic return does not excuse failure to engage in project construction within period allowed. Due diligence was not shown when groundwater had not been applied to land seven years after permit issued. Epstein v. DOE, PCHB No. 85-107 (1985).

Time requirements for completion of appropriations are essential in the public interest. When allocating water, Ecology deducts the amount represented by outstanding permits even though the water has not yet been put to full beneficial use. Those granted permits who have not completed their projects have the potential to block subsequent applicants from obtaining water. Case v. DOE, PCHB No. 89-114 (1990).

A water appropriation permit approves withdrawal of water for an approved purpose. The Water Code requires that the project be diligently pursued and a time schedule be set in the permit, but there is no requirement that the project be engineered, laid out or planned before permission to appropriate is granted. Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

The doctrine of substantial compliance may be used to meet the requirements of the Water Code. The substantial compliance doctrine exists specifically for those situations when the literal expression of legislation may be inconsistent with the general objectives or policy behind it. Although the form may be incorrect, the substantive information shown by the applicant may still meet the legislative intent of notifying the state that the water has been put to beneficial use. Kuch v. DOE, PCHB No. 92-218 (1994).

Expansion of water use over time constitutes perfection of a water right with due diligence within the meaning of RCW 90.03.460. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

Recognizing that localized subdivision development may not expand as certainly as cities do, the time necessary to fill out a slowly developing subdivision may not be reasonable where there is intense competition for water by later applicants. Theodoratus v. DOE, PCHB No. 94-218 (1995).

The state encourages maximum beneficial use of water by requiring a water right permit holder to complete the construction work necessary to develop the right within such reasonable time as shall be prescribed by Ecology and further requiring that the construction work be prosecuted with diligence and completed within the time prescribed. Petersen v. DOE, PCHB No. 94-265 (1995).

A permitee may not maintain a permit indefinitely, because to do so makes the water unavailable to others who might wish to put it to a beneficial use. The permit is by nature an intermediate stage in the creation of the water right and must be diligently pursued to be maintained. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

Diligence is a necessary element in order to acquire a right that has a priority date that relates back to the date of application or to the date of first beneficial use. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

Speculation does not apply where the water right holder was continuously engaged in some affirmative effort to put the diversionary water right to beneficial use. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Washington's Water Code provides that, "Subject to existing rights, all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use...." Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

2. EXTENSIONS

Where permits may be extended on a showing of "good cause" Ecology may not cancel permits on the basis of a blanket policy allowing only three years to develop. Zaser and Longston v. DOE, PCHB No. 78-148 (1978); Starke v. DOE, PCHB No. 78-149 (1978).

Permittees may not reserve a priority date indefinitely without plans to initiate the stated use. Extensions of permits need not be granted beyond the time needed to develop such use. Ellis and Hunter v. DOE, PCHB No. 82-190 (1983).

Withdrawals from appropriation under chapter 90.40 RCW are effective for three years from the filing of a certificate of project feasibility. Ecology may extend the duration of such withdrawals, but only if the United States authorizes the project within the initial three years. An extension is

not untimely if granted after the three year period. Ellensburg Water Co. v. DOE, PCHB No. 86-153 (1990).

An application for extension of a withdrawal under chapter 90.40 RCW must be published in each county where works are to be constructed. Failure to publish in one of three counties involved in project means that application must be advertised in omitted county and redecided as to that county in light of comments received; as to other two counties extension may be affirmed. Ellensburg Water Co. v. DOE, PCHB No. 86-153 (1990).

A permitee who cannot meet Ecology's development schedule may request one or more extensions from the agency. The permitee must justify the extension request. The most common reasons for granting an extension are as follows: 1) engineering problems, 2) right of way disputes, 3) illness of the principal permitee, 4) litigation, and 5) financial problems encountered by the permitee. Ecology generally grants a permitee a one year extension where good cause is shown. Ecology grants extensions with the understanding that permittees are expected to perfect their water rights with due diligence. Petersen v. DOE, PCHB No. 94-265 (1995).

Ecology is accorded the discretion to grant extensions of the prescribed construction time as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected. Petersen v. DOE, PCHB No. 94-265 (1995).

Given that fourteen years had passed since appellant received such permits, the PCHB concluded appellant had not developed the permits with due diligence. The PCHB concluded that any further extensions would have been unreasonable since appellant estimated that he needed another six years to develop the permits. Petersen v. DOE, PCHB No. 94-265 (1995).

Extensions may be granted, but only after consideration of the good faith of the applicant and the public interest. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

Gradual development of a project may be diligent if the ultimate use of water was within the original intent of the appropriator, was claimed at the time of initiating the appropriation, and proceeded with reasonable diligence. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

Ecology may condition the extension of a water permit on the requirement that a certificate of vested water right will issue only to the extent that water has been put to an actual beneficial use, even though the original

permit allowed the permitee to obtain a certificate of vested water right based on the capacity of the permitee's water delivery system. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

3. CANCELLATION

RCW 90.03.320 requires that Ecology cancel a permit to appropriate if construction of a diversion is not completed within the time allowed by the permit. The burden is on the permitee to show good cause why the permit should not be canceled. Pack v. DOE, PCHB No. 213 (1974).

Difficulties with zoning and platting accompanying a proposed reservoir are not good cause for failure to construct within permitted period. Pack v. DOE, PCHB No. 213 (1974).

The failure of a permitee to show good cause for extension, after the 60-day notice of intent to cancel required by RCW 90.03.320, leaves Ecology no discretion. The permit must be canceled on its expiration date. Quast v. DOE, PCHB No. 457 (1974).

RCW 90.03.320 requires cancellation of an appropriation permit if construction is not completed within the time allowed by the permit. The burden is on the permitee to show good faith efforts and good cause not to cancel the permit. Chvatal v. DOE, PCHB No. 471 (1974).

The failure of a person's well digger to request a permit extension does not constitute good cause precluding the canceling a permit. Chvatal v. DOE, PCHB No. 471 (1974).

Unpublicized internal operating procedure cannot serve as the basis for canceling a permit application required by adopted regulations to be held in abeyance until results of next annual measurements of groundwater levels. Kagele Farms v. DOE, PCHB No. 731 (1975).

A permit cancellation pursuant to RCW 90.03.320 is reasonable when the permitee is unable to timely complete construction because of his financial situation and has no assurance that the situation will change. Extension in such circumstances would be against the public interest involved in prohibiting reservation of water for speculative future use. Goldy v. DOE, PCHB No. 938 (1976).

Desire for extension in order to seek to transfer undeveloped permit to land which might be offered for sale in future did not establish "good cause" for extension. Gwyn Farms v. DOE, PCHB No. 78-159 (1978).

Facts unknown to Ecology when it canceled a permit may be presented at the hearing on appeal by an appellant. Laas v. DOE, PCHB No. 78-176 (1978).

Assertion of depressed economic conditions and lack of funds to develop is not sufficient reason to overturn Ecology's cancellation of permit for failure to meet development schedule. Williamson and Wheeler v. DOE, PCHB No. 78-153 (1979).

Where permits may be extended on a showing of good cause, requisite showing is not made where water could have been applied to crops on parcel in question within permit schedule, but conscious choice was made to divert it to another parcel. Zaser and Longston v. DOE, PCHB No. 78-250 (1979).

Where water is not applied to the land within permit development term, the permit may be validly cancelled, notwithstanding that well and pump and pipeline were installed. Herzog v. DOE, PCHB No. 79-112 (1979).

Application for change of use is not adequate showing of cause to refrain from canceling permit, when the application is devoid of detail about the new use. University Place Water Co. v. DOE, PCHB No. 80-60 (1980).

Holding off on permitted development on the possibility that another use might appear more attractive does not provide grounds for reversal of decision to cancel permit for failure to complete appropriation on schedule approved by state. Arazi v. DOE, PCHB No. 82-182 (1983).

Absent conflict with the stated objects of the groundwater management program, cancellation of permits for artificially stored groundwater should be based on analysis of whether facts show lack of diligence in seeking project completion. Delay caused by good faith efforts to reach required agreement with U.S. Bureau of Reclamation and by unusual amount of rock removal needed to prepare land for crops provided basis for additional extension of development period. Dept. of Natural Resources & Benedict v. DOE, PCHB No. 79-84 (1980).

Good cause for further extension of development schedule was not shown where groundwater appropriation was uncompleted after six years and no evidence was presented indicating a likelihood of imminent progress toward completion. Taggares v. DOE, PCHB No. 79-174 (1980).

Failure by due diligence to apply water to the entire acreage allowed in permit, justifies partial cancellation to reflect acreage actually irrigated within prescribed development schedule. Moon v. DOE, PCHB No. 79-103 (1980).

Where adjacent permits junior in priority had been fully perfected, further extension of uncompleted appropriation would violate "public interest" as used in RCW 90.03.320. Taggares v. DOE, PCHB No. 79-174 (1980).

Failure to provide 60 days notice of intent to cancel a permit under RCW 90.03.320 does not necessarily invalidate the cancellation. Lack of surprise and substantial compliance with the notice requirements, considered together with the availability of de novo hearing before the PCHB can operate to vitiate any harm that failure to send formal notice might cause. Case v. DOE, PCHB No. 89-114 (1990).

If the terms of the permit or extension thereof, are not complied with Ecology shall give notice by registered mail that such permit will be canceled unless the holders thereof shall show cause within sixty days why the same should not be canceled. If cause be not shown, said permit shall be canceled. Kuch v. DOE, PCHB No. 92-218 (1994).

RCW 90.03.320 requires that a permit be canceled by an affirmative order that cancellation has taken place rather than by operation of law. Kuch v. DOE, PCHB No. 92-218 (1994).

Cancellation of the permits serves the public interest in freeing up the water rights granted in these two permits for allocation to the other applicants who are waiting in line for water. Petersen v. DOE, PCHB No. 94-265 (1995).

A permit will be cancelled if the request for appropriation is not pursued with due diligence. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

RCW 90.03.320 requires Ecology to cancel a permit if the water is not appropriated for beneficial use. City of Ellensburg v. DOE, PCHB No. 96-194 (1996).

C. PRIORITY/RELATION BACK

Under RCW 90.03.270 the priority of a right is established as of the date of the filing of an application for permit. Once the appropriation is perfected by actual use, the priority of the right acquired relates back to the date of filing of "the original application." RCW 90.03.340.

The "first in time is first in right" principle (RCW 90.03.010) is an all or nothing principle. In times of shortage, mutual cutbacks are not mandated. Rather the full appropriation of each appropriator is available in order of seniority to the point where existing supplies are exhausted. The remaining (junior) appropriators are, then, cut off all together. (WD).

A record of a completed appropriation is required in order to establish an appropriation priority date. Reese v. DOE, PCHB No. 400 (1973).

In requiring resubmittal of an application, Ecology has no authority to transfer the priority date to the date of resubmittal. Peterson v. DOE, PCHB No. 77-15 (1977).

Where three applications for domestic use from a spring were filed within a few days of one another, and enough water was produced by the source to provide a sufficient supply to all three (with reasonable storage), Ecology did not err in approving the earliest of the applications for less than the amount applied for. The first in time is first in right principle was properly applied by giving the earliest applicant priority over the others. Rodenbaugh v. DOE, PCHB No. 80-202 (1981).

Since passage of 1917 Water Code, priority has been established by date of permit application. That actual use by one appropriator may have preceded another's use of a source does not confer priority of right where the first user filed the later application. Anderson & Assocs. v. DOE, PCHB No. 81-76 (1983).

In the priority system, if a senior appropriator does not demand his entitlement at a given moment, the water may be applied to junior priority uses. A person whose use has been regulated cannot successfully wait until his hearing on appeal to assert his claim to seniority. Williams v. DOE, PCHB No. 86-63 (1986).

Under chapter 90.40 RCW, the U.S. Bureau of Reclamation can make notice of withdrawal of waters of the state for federal project purposes. While such a withdrawal is in effect, the waters specified cannot be appropriated by others. If the project is completed, the appropriation by the United States relates back in priority to the date of the original notice of withdrawal. Ellensburg Water Co. v. DOE, PCHB No. 86-153 (1990).

The right acquired by appropriation shall relate back to the date of filing of the original application with Ecology. RCW 90.44.060. Deatherage v. DOE, PCHB No. 93-264 (1994).

Prescription or adverse possession is not applicable to the public waters of the state. McLeary v. Department of Game, 91 Wn.2d 647, 591 P.2d 778 (1979); Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979); Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

D. BENEFICIAL USE

See RCW 90.54.020(1) for a statutory listing of uses declared to be beneficial. Washington statutes do not expressly give one type of use preference over another. However, the "maximum net benefits" language of RCW 90.54.020(2) provides a basis for discriminating among competing potential uses and users.

Fish propagation is a beneficial use. Nasburg and Clapp v. Department of Water Resources, PCHB No. 70-25 (1971).

Use of flowing stream for fisheries research is a beneficial use. The use need not be consumptive. Bevan v. DOE, PCHB No. 48 (1972).

Waste of water is not a beneficial use. Thus, Ecology may limit a permit to a withdrawal rate which insures minimal waste. A program of cautious monitoring which assures minimal waste will justify increasing the withdrawal rate. Robinson v. DOE, PCHB No. 929 (1976).

The beneficial use standard does not expressly or impliedly require Ecology to find that the use intended is the most beneficial use which can be contemplated. Heer v. DOE, PCHB No. 1135 (1977).

The allocation principles of chapter 90.54 RCW allow Ecology to give preference to domestic usage when considering applications pending simultaneously for use of a small stream, notwithstanding that power generation was requested in the earlier-filed of the applications. Smith v. DOE, PCHB No. 81-34 (1981).

An appropriation permit is the state's permission to use public waters for a purpose deemed "beneficial." The beneficial use criterion does not require that a project be engineered, laid out or fully planned before permission to appropriate is granted. Bucklin Hill Neighborhood Assoc. v. DOE, PCHB No. 88-177 (1989).

A withdrawal of waters under chapter 90.40 RCW can be made for any federal project purpose specified in the federal Reclamation Act as amended, including fish and wildlife conservation. Ellensburg Water Co. v. DOE, PCHB No. 86-153 (1990).

Domestic, commercial and light industry are all beneficial uses. RCW 90.54.020(1). Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Irrigation is a beneficial use under RCW 90.54.020(a). Richert v. DOE, PCHB No. 90-158 (1991).

Providing water for wildlife habitat is a beneficial use. Thurlow v. DOE, PCHB No. 90-235 (1991).

The extent of a water right is based on the concept of "beneficial use" under which an appropriated water right is created and maintained by purposefully applying a quantity of water to a beneficial use upon the land. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

The holder of an appropriated water right may use the water for any beneficial use. The right is not limited to only those uses for which the appropriation was originally made nor is the right lessened by changing from one beneficial use to another. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

A beneficial use of irrigation water on agricultural land is any use that contributes to the production of crops. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

Frost protection is a beneficial use of water for irrigation or agricultural purposes. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

The creation of an artificial wetland for the maintenance and enhancement of game and other aquatic life is a beneficial use of the water. Hazen, et al. v. DOE, PCHB Nos. 93-33 & 34 (1993).

The proper test for determining beneficial use to water rights acquired by appropriation, including the identity and weight of factors used in the test, is a question of law that is reviewed de novo by an appellate court. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

An appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land. Such a right is appurtenant to the land, perpetual, and operates to the exclusion of later claimants. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

For purposes of appropriated water rights, "beneficial use" has two elements: (1) the purposes or types of activities for which the water may be used and (2) the amount of water that may be used as limited by the principle of "reasonable use". DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Beneficial uses include environmental protection. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

Beneficial use as defined at RCW 90.54.020(1) includes domestic, irrigation and recreational uses. No priority is conferred by statute ranking these beneficial uses. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

Municipal public water supply systems apply water to a beneficial use when pumps and pipes are put in place to satisfy the needs resulting from a normal increase in population, within a reasonable period of time. The holding also applies to non-municipal public water supply systems. Theodoratus v. DOE, PCHB No. 94-218 (1995), overruled by DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Beneficial use is a term of art which both implies the purpose of the use and the measure of the right. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The purpose of supplying water for human consumption is beneficial. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The basis, measure, and limit of the right to use the waters of the state are governed by the doctrine of beneficial use, under which an appropriated water right is created and maintained by purposefully applying the water to a beneficial use upon land. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A water right may not be confirmed in a general adjudication of water rights under RCW 90.03.110-.245 unless the trial court makes a finding of fact that the specified quantity of water has been put to a beneficial use. A water right may not be confirmed on the basis of a prior allocation or the carrying capacity of the user's system absent a finding that the allocation or quantity of water the system can carry has been put to a beneficial use. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A contract between parties specifying respective allocations of surface water does not establish a water right under state law; a water right is based solely on actual beneficial use of the water. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

Water must actually be put to a beneficial use before a right to it vests. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

"Beneficial use" refers to both the type of use to which water is put and the measure and limit of a water right. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

An inchoate right to use water ripens into a vested water right only in the amount of water actually put to a beneficial use. An inchoate water right is an incomplete appropriative right in good standing that comes into being when the first step required by law for acquiring an appropriative right is taken. The inchoate right remains in good standing for so long as the requirements of the law are fulfilled. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Under RCW 90.44, RCW 90.03.250.-340, and the common law, a certificate of vested water right may be issued only for a quantity of water actually put to a beneficial use. A certificate may not be issued on the basis of the capacity of the delivery system that would be used to transport the water (popularly known as the 'pumps and pipes' measure) if system capacity is greater than the quantity of water put to a beneficial use. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The rule that a right to appropriated water does not vest unless the water is put to a beneficial use applies to public water systems and irrigation systems. The terms "beneficial use of water" and "perfection of water right" have the same meaning whether the water is used for private residential development or crop irrigation. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

A water right is measured by the quantity of water put to a beneficial use and the time at which the water is used; i.e., an appropriated water right is limited by the time and volume of the original beneficial use. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

While it is true that historic beneficial use of water is important in analyzing whether a water right is retained, beneficial use alone, without the appropriate legal underpinning, does not establish a water right. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

The nature of a water right is that it is a continuous entitlement, so long as it is beneficially used. Willows Run Golf Course v. DOE, PCHB No. 00-160 (2001).

The term "stock watering purposes" in RCW 90.44.030 covers all reasonable uses of water normally associated with the sound husbandry of livestock (defined as "domestic animals kept for use on a farm or raised for sale or profit"). This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The term "industrial" in RCW 90.44.030 does not include all agricultural uses. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

Any beneficial use of water is a public use. Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

Beneficial use is a term of art under the water code and encompasses two principal elements of a water right: purpose and quantity. When referring to purpose, beneficial use is defined to mean productive, end use of water. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The legislature has defined beneficial uses of water to include fish and wildlife maintenance and enhancement... and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

Flow augmentation and the use of water for stream flow mitigation are beneficial uses of water for which a water right is required. Conifer Ridge Enterprises v. DOE, PCHB No. 96-11 (1998); Okanogan Highlands Alliance v. DOE, PCHB No. 97-146 (1998); Bevan v. DOE, PCHB No. 48 (1972); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

Where the capture of water is for a specific beneficial purpose, and a purpose that must be maintained in perpetuity, the basic principles of water law govern. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

An applicant can obtain a right to a certain flow in surface water to support fish propagation research. Bevan v. DOE, PCHB No. 48 (1972); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

A surface water right to support fish propagation research is not the establishment of a minimum flow by private action. Bevan v. DOE, PCHB No. 48 (1972); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

E. SCOPE OF RIGHTS

1. WATER DUTY/ACREAGE

The duty of water is the annual quantity of water required to carry out the beneficial use involved. For irrigation rights it is the number of feet (or inches) needed per acre to grow crops on the land in question during one growing season. Irrigation rights are limited to a specified number of acres and the duty of water appropriate for those acres, given the conditions of the locality. (WD).

Proposal to use land for managed pheasant habitat did not justify retention of water duty intended for agricultural irrigation. Moon v. DOE, PCHB No. 79-103 (1980).

When a permit or certificate limits irrigation to a specific number of acres within a larger legal description, irrigation of no more than that specific number of acres may occur during any irrigation season. Moving the water over the entire described acreage during any crop year is an unauthorized expansion of the right. Kummer v. DOE, PCHB No. 85-188 (1987); Benningfield v. DOE, PCHB No. 87-106 (1987).

The authorized duty of water for an acreage is merely a maximum quantity, up to which water can be applied in any year. Each growing season the right for any acre is limited by the doctrine of beneficial use to the actual amount (within the maximum authorized) needed to grow the crop planted. Use of more would constitute prohibited waste. Benningfield v. DOE, PCHB No. 87-106 (1987).

In calculating the amount of acre-feet per year for irrigation, Ecology consults the State of Washington Irrigation Guide. Pariseau v. DOE, PCHB No. 92-142 (1993).

"Water duty" is the amount of water that, by careful management and use and without wastage, is reasonably required to be applied to a parcel of land for the period of time that is adequate to produce a maximum amount of such crops ordinarily grown on the land. "Water duty" varies according to conditions. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

A determination of a water duty that is supported by a preponderance of the evidence will not be disturbed on appeal. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

2. CONDITIONS OF APPROVAL

The right evidenced by a certificate is limited in scope by the conditions imposed on the underlying permit. Where a permit is issued as supplemental to another (primary) source of supply, the right ultimately acquired is no more than a supplemental right. Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

Groundwater appropriations are limited by the terms of the permit grant which may specify the total annual volume, the maximum rate of withdrawal and the authorized season of use. A request for increase in any of these limits is a request for a new right, not a request to change an existing right. Phillips v. DOE, PCHB No. 79-73 (1980).

Appropriators of either surface or groundwater are limited to the use of water as specified in permits or certificates issued by DOE. Any rights acquired can only be within the scope of the permission granted by the state. Kummer v. DOE, PCHB No. 85-188 (1987).

In general, an administrative agency having discretionary authority to grant or renew a permit may impose conditions on any such grant or renewal. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

A person seeking the renewal of a government permit is not necessarily entitled to proceed under the conditions imposed on the original permit if the renewal decision is discretionary with the issuing agency. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Ecology may impose conditions on the extension of a water permit in order to satisfy any public interest concerns that may arise, provided that the extension and the conditions imposed thereon comply with all applicable statutes. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Ecology may impose a condition on the extension of a water permit in order to correct an unlawful provision in the original permit. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

3. WASTE

The law of prior appropriation is the outgrowth of water development in arid regions. One of its original fundamentals was the concept that every drop should be put to work in some useful way. (WD).

RCW 90.03.290 mandates that DOE have "due regard to the highest feasible development of the use of waters belonging to the public."

The corollary of this utilitarian historical basis is the notion of waste. In the appropriation process, any portion of the water involved which somehow escaped application to the beneficial use intended was regarded as being "wasted." RCW 90.03.005 speaks of "the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters."

Failure to impound and store flood waters may amount to "unconscionable waste" as that term is used in relation to stockwater in RCW 90.22.040. Scheibe v. DOE, PCHB No. 36 (1972).

Use of groundwater for irrigation when the ground is frozen or otherwise nonpermeable or saturated constitutes waste. Franz v. DOE, PCHB No. 558 (1975).

Use of excessive groundwaters for irrigation can constitute waste when the excess returns to the aquifers at such a slow rate that the water table declines. Franz v. DOE, PCHB No. 558 (1975).

In processing permits, the agency must consider the basic tenet of western water law- the prevention of wastage. Simpson v. DOE, PCHB No. 846 (1976).

Escape of water up bore hole from a high pressure deep aquifer into a low pressure shallow aquifer constitutes waste contrary to RCW 90.44.110. Clerf v. DOE, PCHB No. 78-98 (1978).

Exemption from the prohibition of waste for withdrawals in connection with "construction, development, testing or repair" of a well is qualified under RCW 90.44.110 by the requirement of reasonableness. Periodically opening a completed artesian well and allowing water to flow away without beneficial use constitutes waste, supporting issuance of a civil penalty. Paradis v. DOE, PCHB No. 85-182 (1986).

Landowners are required to take whatever measures are necessary to guard against waste and contamination of groundwaters. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

For purposes of appropriated water rights, the amount of water that constitutes a "reasonable use" is limited by the doctrine of waste. Water usage must be reasonably efficient and economical in light of other present and future demands upon the source of supply. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Whether appropriated water rights for irrigation are being wasted or are being used reasonably efficiently depends on such factors as the

established means of diversion and application according to the reasonable custom of the locality and, under RCW 90.03.005, the costs and benefits of improvements to irrigation systems, including the use of public and private funds to facilitate improvements. The customary irrigation practices common to a locality do not, however, justify waste of water. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Appellants' arguments that use of water for a lake is wasteful are without merit in light of the fact that such use is less consumptive than the current use for irrigation. The proposed lake additionally provides storage of water for irrigation and fire fighting. While a recreational lake could be sized so that evaporative loss might constitute a wasteful practice, that is not the case with the proposed lake given its size and multiple uses. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

The duplication of water rights can result in the "waste" of water. The waste of water is unlawful. RCW 90.03.005 speaks of "the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters." Coles v. DOE, PCHB No. 96-93 (1997).

F. HYDRAULIC CONTINUITY

1. DEFINITION

RCW 90.54.020(9) requires that in the administration of water allocation and use programs "full recognition shall be given .... to the natural interrelationships of surface and ground waters."

Under RCW 90.44.030:

"… to the extent that any underground water is part of or tributary to the source of any surface stream or lake, or that the withdrawal of groundwater may affect the flow of any spring, water course, lake, or other body of surface water, the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to ground water."

RCW 90.44.030 is intended to express the relationship between two statutes enacted at different times and does not establish an additional test which Ecology must apply prior to granting a groundwater permit. However, a surface water right is a water right which can be impaired by a groundwater appropriation under the criteria of RCW 90.03.290. Heer v. DOE, PCHB No. 1135 (1977).

When significant hydraulic continuity exists, it is possible to change the point of withdrawal of a water right from groundwater to surface water. Pitts v. DOE, PCHB No. 85-146 (1986).

Hydraulic continuity is the interrelationship between ground and surface water. When hydraulic continuity exists between two sources a withdrawal from one source will affect the flow of the other source. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

"Hydraulic continuity" is "the natural interrelationship between ground and surface waters." Schrum v. DOE, PCHB No. 96-36 (1996).

"Hydraulic continuity" means that there exists a connection and interaction between groundwaters and surface waters. An aquifer is in hydraulic continuity with surface waters (lakes, streams, creeks, ponds) when, for example, it is discharging water into surface waters or when surface waters recharge or induce recharge to the aquifer. Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996); Herzl Memorial Park v. DOE, PCHB No. 96-54 (1996).

An aquifer is in hydraulic continuity with surface waters when it is discharging to, or being recharged by, surface water. Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Hydraulic continuity exists if the "evidence demonstrates that any of the water extracted from the ground at the place, and depth, in question would otherwise have contributed to a particular surface water." Schrum v. DOE, PCHB No. 96-36 (1996); Oetken v. DOE, PCHB No. 96-42 (1997).

Under current hydrogeological understanding, the appropriation of groundwater in hydraulic continuity with surface water results in reduced stream flow by diverting water that would otherwise discharge to surface water or inducing the recharge of surface water in response to the reduction in storage capacity within the aquifer. Any groundwater appropriation will therefore ultimately translate into a reduced surface water flow. Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997).

RCW 90.44.030 emphasizes the potential connections between groundwater and surface water and expresses the Legislature's intent that groundwater rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of first in time, first in right. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

2. DETERMINATION

Groundwater withdrawals may be made subject to curtailment when surface flows fall below established minimum instream flow levels where "measurable continuity" between the groundwater and surface water are shown. Use of the Theis equation, in lieu of actual measurement, can establish "measurable continuity." Anders v. DOE, PCHB No. 78-38 (1978); Hole v. DOE, PCHB No. 86-231 (1987).

The "Theis" equation is generally recognized in the field of hydrology for calculating the percentage of well withdrawal which is diverted from a nearby river when basic data concerning the area geology are known. The Jenkins and Jacob models are more recent and also recognized in the field of hydrology for determining relationships between surface and groundwater flows. Richert v. DOE, PCHB No. 90-158 (1991).

Qualitative analysis including hydrogeological studies describing "likely effects" of groundwater pumping on surface water, or computer modeling such as the Theis equation, provides a sufficient and valid basis for Ecology to determine that groundwater is tributary to surface water for the purposes of administering and regulating a groundwater appropriation to protect senior surface water rights. Richert v. DOE, PCHB No. 90-158 (1991).

The four tests identified to distinguish between separate aquifers include: geologic information, hydrologic testing, water levels, and water chemistry. Of these four tests only hydrologic testing can provide conclusive data to identify separate and distinct aquifers on its own or determine that a single aquifer exists. The remaining three tests can provide supporting evidence, but do not provide conclusive data that can be used exclusively for the determination that separate and distinct aquifers or a single aquifer exists. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

Hydraulic continuity may be established by modeling in lieu of actual measurement. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995); Schrum v. DOE, PCHB No. 96-36 (1996).

Qualitative analysis, including hydrogeological studies describing the "likely effects" of groundwater pumping on surface water, provide a sufficient and valid basis for Ecology to determine whether groundwater is tributary to surface water for the purposes of administering and regulating groundwater appropriation. The mathematical "Theis" equation may also be used by Ecology to determine whether ground and surface waters are in hydraulic continuity. Hubbard, et al. v. DOE, PCHB

Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The projection of some impact on surface and groundwater pumping within one year is sufficient to establish direct hydraulic continuity within the meaning of the regulation. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

The amount of water involved is not a factor in establishing the existence of hydraulic continuity. Oetken v. DOE, PCHB No. 96-42 (1997).

Hydraulic continuity is a scientific fact which, once established in any degree, need not meet any further standard or test to be given full credit in Ecology's water allocation decisions; it is not necessary for there to be a measurable effect on the surface water. Postema v. DOE, PCHB No. 96-101 (1997).

Hydraulic continuity is a scientific fact that, once established in any degree, is to be accounted in Ecology's water allocation decisions. Tulalip Tribes of Washington v. DOE, PCHB No. 96-170 (1997).

In determining whether an aquifer is in hydraulic continuity with a surface stream and whether a proposed groundwater withdrawal will impair existing surface water rights or affect the flow of a surface stream closed to further appropriation, Ecology may employ any such new information, scientific methods, or modeling techniques that may become available and that are appropriate to the purpose. Ecology is not restricted to standard measuring equipment with the limits of five percent or any other methodology or technique that may become outdated; nor is Ecology required to adopt a rule before it may employ new information or a new measuring technique or methodology. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

For purposes of determining whether a proposed groundwater withdrawal will impair an existing surface water right, Ecology is not required to find a measurable surface water impact at the very point where the existing holder of the surface water right is diverting the surface water. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

3. LEGAL CONSEQUENCES

Where Ecology had closed surface waters to further diversions because of full appropriation, the agency properly denied supplemental irrigation water from a shallow well in direct hydraulic continuity with the stream. Olsen v. DOE, PCHB No. 78-58 (1978); Zwar v. DOE, PCHB No. 78-233 (1979).

Near an adjudicated stream in a water short area, a proposed groundwater withdrawal was found more likely than not to reduce stream flows available to prior appropriators. Such hydraulic continuity requires groundwater permit approval to be reversed because of probable impairment of existing rights. Plakos v. DOE, PCHB No. 87-38 (1988).

In area where further surface water diversions have been denied in the interests of fish habitat protection, an application to legitimize use of a long established system serving as the sole source of domestic water for a rural home was not sufficiently investigated by Ecology, where evidence failed to establish whether source was a well or a spring. Fields v. DOE, PCHB No. 90-15 (1990).

As a question of fact, the hydraulic continuity between groundwater at a certain place and a particular surface water need not meet any further standard or test to be given full credit in Ecology's water allocation decisions. Once established factually, hydraulic continuity with a particular surface water enables Ecology to assess the link between a groundwater withdrawal and any resulting impairment of senior rights in that related surface water, including the rights of the public in maintaining minimum instream flows. Sammamish Plateau Water & Sewer District v. DOE, PCHB Nos. 96-144 & 96-154 (1996); Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996); Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996); Herzl Memorial Park v. DOE, PCHB No. 96-54 (1996).

In investigating permits to appropriate groundwater, Ecology is obliged to consider the "natural interrelationships between surface and groundwater even if a watershed is only closed by rule to further surface water appropriations." Schrum v. DOE, PCHB No. 96-36 (1996).

In any future permitting actions relating to groundwater withdrawals, the natural interrelationship of surface and groundwaters shall be fully considered in water allocation decisions to assure compliance with the intent of this chapter. Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996).

Adoption by Ecology of a rule closing a basin to further appropriations constitutes a determination that further appropriations of groundwater, in hydraulic continuity with a closed surface water body or its tributaries, would impair existing rights and instream values protected by statute. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

Where base flows in a closed basin are not being met, and where groundwater pumping is contributing to that phenomenon, any further

withdrawal of groundwater in hydraulic continuity with the surface water for which such base flows have been set, will, as a matter of law, constitute an impairment of existing rights, contrary to the Water Code. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996); Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

As a matter of law, Ecology may not grant an application to withdraw groundwater, for consumptive use, which is in hydraulic continuity with a surface water which has been closed by rule. Sammamish Plateau Water & Sewer District v. DOE, PCHB Nos. 96-144 & 96-154 (1996).

Where surface waters have been closed by rule to further appropriation, and a proposed groundwater withdrawal is in hydraulic continuity with any of the surface waters, Ecology may rely on the closure by rule to deny a groundwater application so as to prevent impairment of senior rights and instream values protected by statute. Northeast Sammamish Water and Sewer District v. DOE, PCHB No. 96-146 (1996).

Ecology may not grant an application to withdraw groundwater, for consumptive use, which is in hydraulic continuity with a surface water which has been closed by rule. Herzl Memorial Park v. DOE, PCHB No. 96-54 (1996); Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996); Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996); Tulalip Tribes of Washington v. DOE, PCHB No. 96-170 (1997).

Ecology may not grant an application to withdraw groundwater, for consumptive use, which is in hydraulic continuity with a surface water body in which minimum instream flows set by rule are not being met. Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996); Wells v. DOE, PCHB No. 96-82 (1997); Lesley Thorne d/b/a Cedar Crest Mobile Home Park v. DOE, PCHB No. 97-66 (1997).

It would be inappropriate to ever grant a new groundwater right in hydraulic continuity with a regulated stream unless the proposed use can be controlled to regulate the timing of or fully mitigate the impact on surface water. Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997).

Under RCW 90.44.030, the rights of a surface water appropriator are superior to subsequently acquired rights to groundwater that are tributary to the source of the surface water or that may affect the flow of the surface water. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Under the Water Resources Act of 1971 (chapter 90.54 RCW), the Water Code of 1917 (chapter 90.03 RCW), and WAC 173-549-060, Ecology is authorized to determine if significant hydraulic continuity exists between

an undergroundwater source and a river or stream, and Ecology may protect the minimum instream flow of a river or stream by restricting groundwater withdrawals having significant hydraulic continuity with the river or stream. The hydraulic continuity between an undergroundwater source and a river or stream is 'significant' if the water source ultimately drains into the river or stream. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Based upon a finding of hydraulic continuity with regulated waters closed to further diversions, the PCHB concluded granting groundwater applications would adversely affect the closure, the base flows and the values the base flows were designed to protect. As a matter of law, the granting of the proposed applications would constitute an impairment of existing rights, contrary to the Water Code. Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

Ecology's adoption of an administrative rule closing a stream to further consumptive appropriation constitutes a determination that further appropriations of groundwater in hydraulic continuity with such streams would impair existing rights and instream values protected by statute. Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

Where base flows are not being met, the water body must be treated in the same manner as streams subject to outright closure and no additional groundwater rights in hydraulic continuity may be granted without impairing the existing right to adequate instream flow. Evergreen Golf Design v. DOE, PCHB No. 96-8 (1997).

Ecology may deny a groundwater application if necessary to protect minimum instream flows in a surface water body with which that groundwater is in hydraulic continuity. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

Under RCW 90.03.290, a permit to appropriate groundwater may not be granted if there is no unappropriated water available, the water proposed to be withdrawn will conflict with or impair existing water rights, or the proposed groundwater withdrawal will detrimentally affect the public interest. When it is established that an aquifer from which the withdrawal is to be made is in hydraulic continuity with a surface stream, the permit request must be denied if the withdrawal would impair existing surface water rights, including minimum flow rights as determined by law, or the surface stream is closed to any further appropriations and the groundwater withdrawal would affect the stream flow. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Whether the aquifer is in hydraulic continuity with the surface stream, whether the proposed withdrawal would impair existing surface water rights, and whether the proposed withdrawal would affect the flow of a surface stream closed to further appropriation generally are questions of fact. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The mere fact that the aquifer is in hydraulic continuity with a surface stream having unmet minimum flows or is closed to further appropriation is not, alone, a sufficient basis on which to deny a groundwater appropriation permit. While the number of days a surface stream does or does not meet minimum instream flows is a relevant consideration in determining if the proposed groundwater withdrawal will impair existing surface water rights or will affect a surface stream closed to further appropriation, it is not decisive. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

G. RECAPTURE/LOSS

A holder of a water right who appropriates water and uses it for irrigation retains the right to recapture and reuse the waste, seepage, or return flow water left over after the irrigation. U.S. Bureau of Reclamation v. DOE, PCHB No. 84-64 (1985), *aff'd* DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

Abandonment requires an intent to abandon. Where a contract between U.S. Bureau of Reclamation and irrigation districts expressly disclaimed any such intent, abandonment did not occur. U.S. Bureau of Reclamation v. DOE, PCHB No. 84-86 (1985).

U.S. Bureau of Reclamation is analogous to property owner within project boundary for purposes of the rule that water remains in the control of the initial appropriator until it leaves his land. Therefore, project return flows cannot be appropriated under state law within project boundaries, notwithstanding the absence of recapture facilities. U.S. Bureau of Reclamation v. DOE, PCHB No. 84-64 (1985).

Appropriators utilizing state law cannot obtain rights compelling the continued release to them of surface waters resulting from waste, seepage, and return flows of a reclamation project. Use of such flows is subject to interruption by the U.S. Bureau of Reclamation as the original appropriator. U.S. Bureau of Reclamation v. Skane, PCHB No. 80-36 (1986).

Waste, seepage and return flows entering the ground as a result of reclamation project operations but emerging later to form a marsh are

surface water upon emergence. U.S. Bureau of Reclamation v. Skane, PCHB No. 80-36 (1986).

An appropriator of water retains the right to use the water so long as the water remains within the boundaries of the appropriator's property. Only when the water has left the boundaries of the appropriator's property does the appropriator's right to the water depend on the appropriator's intent to recapture the water, whether downstream on another piece of property or otherwise. DOE v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992).

Where water right claims assert a right for "all percolating waters, seepage or return flows from surface sources" put to beneficial use by subscribers of the appellant irrigation districts, the claims relate to surface waters. Alternatively, even if the subject waters may be characterized as groundwater, the appellants' rights therein would be limited to the extent of their water rights currently subject to adjudication in Yakima River proceeding. In either case, Ecology properly denied filing of the claims under RCW 90.14.068. Union Gap Irrigation District v. DOE, PCHB No. 98-263 (1999).

IV. WATER RIGHTS PERMITTING

A. SURFACE WATER PERMITS

1. GENERAL

An application to appropriate surface water is subject to the criteria of RCW 90.03.290. To approve an application, Ecology must find that the proposed diversion will constitute a beneficial use, that water is available, that it will not impair existing rights and that it will not be detrimental to the public welfare. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994).

RCW 90.03.250 prohibits the appropriation of water for beneficial use without a permit issued by Ecology. Lewis v. DOE, PCHB Nos. 96-272 and 96-273 (1997).

There is no legal authority for the proposition that a water right is *per se* unlawful because of a predicted change in the hydraulic divide between two basins. The four-part test in RCW 90.03.290 contemplates an assessment of the environmental effects of a proposed appropriation to determine whether it is detrimental to the public welfare. Rather than a *per se* prohibition, however, this inquiry is properly reviewed in the

context of the four-part test. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, -182, -183, -185, -186, & 98-019 (1999).

Since 1917, a new surface water right can only be acquired if the procedures outlined in chapter 90.03 RCW are followed. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

Where a water right permit is required, it is required *before* any wells are dug, and before any water is withdrawn or diverted. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

All uses of state waters require a permit, with two exceptions: small domesitc wells under RCW 90.44.050 and reclaimed wastewater under 90.46.150. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

Capture of stormwater for use as low flow augmentation requires a water right because it is materially different under the law from familiar stormwater management activities. Where there is a diversion and impoundment system combined with the subsequent application of water to a beneficial use, management of stormwater becomes an appropriation triggering water code requirements. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The use of the water [to augment low streamflows] is not consumptive and therefore not excluded by regulatory closure. Basin closures apply only to issuance of consumptive rights. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

2. PERMIT CRITERIA

Ecology, after investigation, issues a written report granting a permit if it finds "that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare." RCW 90.03.290.

Ecology's decision to allow water appropriation is governed by four substantive criteria of RCW 90.03.290: (1) beneficial use, (2) availability of public water, (3) non-impairment of existing rights, and (4) the public interest. Richert v. DOE, PCHB No. 90-158 (1991).

Before Ecology can grant a water permit, it must determine whether: 1) there is available water for the proposed uses; 2) the uses are beneficial; 3)

the proposed use will not impair existing rights; and 4) the proposed use will not be detrimental to the public welfare. Stenback v. DOE, PCHB No. 93-144 (1994).

The fact that another party's later application in the same basin was approved by Ecology cannot be a basis for Ecology or the PCHB to approve an application if it does not otherwise meet the statutory criteria for approval. Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Sammamish Plateau Water & Sewer District v. DOE, PCHB Nos. 96-144 & 96-154 (1996); Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997).

Ecology shall issue a permit if it finds that each of the following criteria are met: (1) that water is available for appropriation; (2) that the appropriation is for a beneficial use; (3) that the appropriation will not impair existing rights; and (4) that the appropriation will not be detrimental to the public welfare. Cheney v. DOE, PCHB No. 96-186 (1997).

RCW 90.03.290 governs applications for new appropriations of water, and directs Ecology to investigate applications and to issue a water permit if each of these four requirements are met: (1) water is available for appropriation; (2) the appropriation is for a beneficial use; (3) the appropriation will not impair existing rights; and (4) the appropriation will not be detrimental to the public welfare. Schrum v. DOE, PCHB No. 96-36 (1996); Strobel v. DOE, PCHB No. 96-52 (1997); Chandler v. DOE, PCHB No. 96-35 (1997); Oetken v. DOE, PCHB No. 96-42 (1997).

The operative language of RCW 90.03.010, applies as between appropriations. It does not appear to have been intended to be the basis for making an appropriation. An appropriation can only be granted when the applicant meets the statutory criteria of RCW 90.03.290. As a preliminary matter, Ecology must determine if water is available for the appropriation. Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997).

A water right may be granted only where: 1) water is available, 2) for a beneficial use, 3) there would be no impairment of existing rights, and 4) there would be no detriment to the public welfare. That is equally so for both surface and groundwater. Sebero v. DOE, PCHB No. 96-126 (1997); Kiewert v. DOE, PCHB No. 96-157 (1998).

Hillis does not stand for the proposition that Ecology must cancel water rights it has granted to "junior applicants," in favor of a senior applicant whose withdrawal has not been determined to satisfy the necessary

criteria for obtaining a water right. Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997).

RCW 90.03.290 governs applications for new appropriations of water and directs Ecology to investigate the application to determine what water, if any, is available and to determine to what beneficial uses it can be applied. Cheney v. DOE, PCHB No. 96-186 (1997).

RCW 90.03.255 and 90.44.055 do not create any new procedural or substantive statutory requirements beyond those contained in SEPA and the four-part test, with regard to the costs and benefits, including environmental effects, of water impoundments and other resource management techniques. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, -182, -183, -185, -186, & 98-019 (1999).

Water right applications are subject to the four-part test under RCW 90.03.290 and RCW 90.44.060. There must be an affirmative showing that water is available for appropriation, the proposed appropriation is for a beneficial use, the appropriation will not impair existing rights, and the appropriation will not detrimentally affect the public welfare. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

In order to grant a new water right, "Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare." Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000). Each of these tests are stand alone tests that must be met before a new water right can issue. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

3. PERMIT TYPES

General

The surface water appropriation permit is a document authorizing the construction of physical works and the diversion or other use of water, leading to the issuance of a Certificate of Right upon completion of the project and actual use of the water. The Certificate evidences acquisition of a property interest of potentially infinite duration, so long as it is not abandoned or forfeited by non-use. (WD).

Preliminary/Temporary/Seasonal

Two kinds of permits can be acquired during the pendency of an appropriation application. One, a preliminary permit, can be obtained for

a maximum of five years in order to allow the applicant time to conduct surveys, investigations, and studies required by Ecology. RCW 90.03.290. The other, a temporary permit, can be issued to allow use and diversion of water during the pendency of application. RCW 90.03.250.

Permission for a seasonal or temporary change of diversion or place of use can be issued if the change can be made "without detriment to existing rights." RCW 90.03.390. Such seasonal or temporary changes are, in effect, short-term amendments to existing permits or certificates.

As Ecology conditioned issuance of a certificate of water right until after "a final investigation is made," the PCHB concluded that the permit be issued as a temporary permit with conditions additional to those defined by Ecology. Hall v. DOE, PCHB No. 92-32 (1992).

The granting of a temporary permit shall not be construed, by inference or otherwise, that the subject application will ultimately be approved. Wells v. DOE, PCHB No. 96-82 (1997).

Reservoir/Secondary

Separate permission must be obtained to construct and maintain a reservoir for the storage. of water. RCW 90.03.370. Third parties proposing to remove and use water from reservoir storage are required to apply for and be granted a secondary permit. The process and criteria for the issuance of both reservoir and secondary permits are the same as for appropriation permits generally.

The ruling on an application to enlarge a reservoir holding more than ten acre feet at normal operating pool level is an appropriate occasion for the imposition of dam safety conditions. Rumball v. DOE, PCHB No. 86-127 (1987).

A supplemental water right can only be used where the primary right goes unfulfilled. Center for Environmental Law & Policy, et al. v. DOE, PCHB Nos. 96-204 and 96-207 (1996).

B. GROUNDWATER PERMITS

1. GENERAL

The requirements for availability of water, beneficial use, non-impairment of existing rights and absence of detriment to the public interest apply to groundwater appropriations, as well as surface water appropriations, by virtue of RCW 90.44.060. In addition, RCW 90.44.070 prohibits permits for the withdrawal of public ground-waters "beyond the capacity of the

underground bed or formation in the given basin, district, or locality to yield such water within a reasonable or feasible pumping lift ."

The provisions of RCW 90.03.290 apply to groundwater applications. Shinn v. DOE, PCHB Nos. 613, 648 (1975).

The limitations of RCW 90.44.070 are separate and distinct from those of RCW 90.03.290. Pierret and Heer Brothers v. DOE, PCHB No. 894 (1976).

Percolating water is public groundwater subject to appropriation for beneficial use only under the terms of chapter 90.44 RCW and not otherwise. Peterson v. DOE, PCHB No. 77-15 (1977).

The issuance of a groundwater permit, as opposed to a building permit, is not ministerial, but involves discretion. Zwar v. DOE, PCHB No. 78-233 (1979).

DOE's decision on a permit is not a matter of applying fixed quantitative standards. Within the statutory standards, there is room for the agency to exercise expert judgment. Whitebluff Prairie Coalition v. DOE, PCHB No. 86-5 (1986).

The purpose of the groundwater code is to extend the application of surface water statutes to the appropriation and beneficial use of groundwaters within the state. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

In addition to the substantive criteria of RCW 90.03.290, Ecology must manage the use of groundwater to maintain a "safe sustaining yield" for prior appropriators. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

The requirement in RCW 90.44.130 for a "safe sustaining yield" does not mean that stored groundwater may never be taken. Instead, it means that the appropriation of waters in excess of annual recharge can be allowed only under circumstances where the ability of existing right holders to fully satisfy their rights by reasonable means can be guaranteed. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

Ecology applies statutory criteria to apportion water resources in an orderly fashion while maintaining a safe sustaining yield from the groundwater body. Precluding Ecology from fulfilling this statutory role would prejudice competing water users and raise the potential for harm to the groundwater resource. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Ecology is charged with administering the program for permitting appropriation of public groundwater in a manner that protects prior appropriators and provides a safe sustaining yield. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

To assure the protection of existing water rights, Ecology evaluated the request for groundwater permit pursuant to its statutory directive to limit appropriations of groundwater to amounts that will maintain and provide a safe sustaining yield to the prior appropriations and avoid overdraft. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

To obtain a new appropriation of groundwater, an applicant must demonstrate that water is available, that the proposed use is beneficial, that the appropriation will not impair existing rights or be detrimental to the public welfare. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

A decision by Ecology to approve a permit for the withdrawal of groundwater from an aquifer is reviewed for an abuse of discretion. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Ecology's issuance or denial of a groundwater permit under RCW 90.03.290 is a decision addressed to Ecology's discretion. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

RCW 90.03.290 of the Water Code of 1917, which governs groundwater appropriation permitting, does not require that every application for a groundwater withdrawal be investigated individually in a strictly chronological order, only that applications for withdrawals within a given water source or watershed be considered in order of application. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

The fundamental purpose of the groundwater code is to provide a complete system of regulation for the distribution of the waters of the state. Kim v. DOE, PCHB No. 98-213 (1999).

The right granted by a groundwater permit is not a perfected water right. The right is not perfected, and a certificate of groundwater right does not issue, until the water is actually applied to a beneficial use. Until the water allowed to be withdrawn under a groundwater permit is actually applied to a beneficial use, the right is inchoate. The inchoate right may not be impaired while the holder of the right is seeking, with reasonable diligence, to apply the water to a beneficial use. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Under RCW 90.44.100, a groundwater permit may be amended to change the location from which the water is drawn, or to change the manner or place of use of the water, notwithstanding the fact that the water has not actually been applied to a beneficial use. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

A groundwater permit may be amended under RCW 90.44.100 to change the location from which the water is drawn, or to change the manner or place of use of the water, if it is determined that water is available to be appropriated for a beneficial use, that the appropriation will not impair existing rights, and that the appropriation will not be detrimental to the public welfare. The availability of water subject to appropriation is determined as of the time the permit holder applied for the original permit, not the time the amendment was sought. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

A groundwater appropriation permit may be denied under RCW 90.03.290 regardless of whether a later-filed application has been granted to withdraw water from the same source. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

All uses of state waters require a permit, with two exceptions: small domesitc wells under RCW 90.44.050 and reclaimed wastewater under 90.46.150. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

2. PERMIT CRITERIA

RCW 90.03.290 is made applicable to groundwater applications by RCW 90.44.060. Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Ecology must protect existing senior water rights when considering whether to approve, condition, or deny an application. Ecology is required to protect instream flows set by regulation from impairment by junior users. Ecology is required to condition appropriation permits in order to protect statutorily established instream flows. To the extent that groundwater is part of or tributary to the source of any surface water or that withdrawal of groundwater may affect the flow of any surface water, the surface water rights are senior to subsequent groundwater rights. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

RCW 90.03.290 obligates Ecology to make four determinations in considering a water right application: 1) whether water is available to be appropriated; 2) whether the proposal is for a beneficial use; 3) whether it

will impair existing rights; and, 4) whether it will detrimentally affect the public welfare. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997); Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997); Kiewert v. DOE, PCHB No. 96-157 (1998); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Ecology shall issue a permit if it finds that each of four criteria in RCW 90.03.290 are met. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997); Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997); Kiewert v. DOE, PCHB No. 96-157 (1998); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Each of the four criteria in RCW 90.03.290 are stand alone tests that must be met before a new water right can issue. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997); Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

The fact that another party's later application in the same basin was approved by Ecology cannot be a basis for approval of an earlier filed application if it does not otherwise meet the statutory criteria for approval. Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996); Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996); Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Hillis does not stand for the proposition that Ecology must cancel water rights it has granted to "junior applicants," in favor of a senior applicant, whose withdrawal has not been determined to satisfy the necessary criteria for obtaining a water right. Meacham v. DOE, PCHB Nos. 96-249 and 97-19 (1997).

Under RCW 90.44.100, a groundwater permit may not be amended to change the purpose for which the water is used. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Where a water right permit is required, it is required *before* any wells are dug and before any water is withdrawn or diverted. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

3. PERMIT EXEMPTION (EXEMPT WELLS)

General

RCW 90.44.050 requires withdrawals of public groundwater (after June 6, 1945) to be authorized by permit. The following relatively small withdrawals, however, are exempt from the permit requirement:

> ". . . any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a non-commercial garden, not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day . . ."

A user of a well for domestic purposes is not entitled to limit an applicant for appropriation from the same source to half of the available supply. The domestic appropriation, though exempt from permit, is restricted to the size of the exemption. Additional water would have to be applied for. Karl & Leah v. DOE, PCHB No. 81-19 (1981).

Adjudicated water rights and exempt well rights are not additive. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

At their option, applicants are entitled to apply for state permits and certificates memorializing the entitlement of their exempt appropriation. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

Exemptions to the Water Code, which is an environmental statute, are to be narrowly construed. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

The 5,000 gallon per day exemption for domestic use, set forth in RCW 90.44.050, allows users to apply for a permit and requires Ecology to issue such permits where the applicant establishes that the exemption fully applies. Schrum v. DOE, PCHB No. 96-36 (1996).

The appurtenancy provision of RCW 90.03.380 ties a water right to the parcel of property in question. It cannot be multiplied either by the filing of successive applications nor by transferring the property and water right to another place of use. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

An exempt use under RCW 90.44.050 is illusory for the purposes of the change statute. Transferring an exempt right would not eliminate the ability of future owners of the property to claim an exempt use in the

future. In essence, granting the change in place of use would accomplish nothing more than transferring a use without affecting the water rights appurtenant to the existing place of use. Any certificate of change issued for a transfer of the exempt use would constitute a grant of a new water right beyond the scope of a change application. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

Purpose of Use

Industrial purposes exemption in the groundwater Code does not apply to commercial nursery/greenhouse operation. The exemption for "Industrial purposes" must be construed narrowly so as to give maximum effect to the underlying policy to which the exemption applies. Kim v. DOE, PCHB No. 98-213 (1999).

From the use of the term "noncommercial," in RCW 90.44.050, it is reasonable to assume that the legislature intended to exclude commercial gardens. Kim v. DOE, PCHB No. 98-213 (1999).

The 5,000-gallon limit found in RCW 90.44.030 is a total limit on an exempt withdrawal for all uses, regardless of the purpose or purposes to which the water will be put to beneficial use. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The term "industrial" in RCW 90.44.030 does not include all agricultural uses. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The term "stock watering purposes" in RCW 90.44.030 covers all reasonable uses of water normally associated with the sound husbandry of livestock (defined as "domestic animals kept for use on a farm or raised for sale or profit"). This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

The use of water under the stockwater exemption in RCW 90.44.030 is limited to 5,000 gallons per day limitation. Dennis & DeVries v. DOE, PCHB No. 01-073 (2001).

Where the proposed use is group domestic uses, the exemption to the permit must be determined with regard to the same conditions necessitating compliance with permitting requirements if the exemption does not apply. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

The exemption does not apply to allow a withdrawal for each lot in a residential subdivision under separate, individual exemptions. A developer may not claim multiple exemptions for the homeowners. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

The term "withdrawal" is a term of art in water law. In general, when one appropriates water, one does so by means of diversion of surface water or by withdrawal of groundwater. The words "diversion" and "withdrawal" both relate to the actual physical acquisition of water to put to beneficial use, and both also relate to the type of right a water right holder has, i.e., diversionary and withdrawal rights. Neither term, in and of itself, defines the scope of the right. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

Relinquishment

RCW 90.14.041 does not apply to claims for an exempt groundwater use. Harder Farms v. DOE, PCHB No. 98-132 (1999).

4. PERMIT TYPES

The standard groundwater appropriation permit is a document permitting well construction and water withdrawal, leading to the issuance of a Certificate of Water Right which evidences a property interest of potentially infinite duration, so long as it is not abandoned or forfeited by non-use.

In addition, temporary permits and preliminary permits can be sought pursuant to RCW 90.03.250 and RCW 90.03.290, by virtue of the incorporation of these provisions into the Groundwater Code. RCW 90.44.060. These permits, issued during the pendency of an application for a standard permit, are to be distinguished from seasonal permits for change of point of diversion or place of use. The latter, available in the groundwater context, through WAC 508-12-210 and WAC 508-12-220, can only be issued to persons whose water use has previously been authorized. (WD).

An emergency withdrawal of groundwater must meet the following criteria: (i) The waters proposed for withdrawal are to be used for a beneficial use involving a previously established activity or purpose; (ii) the previously established activity or purpose was furnished water through rights applicable to the use of a public body of water that cannot be exercised due to the lack of water arising from natural drought conditions; and (iii) the proposed withdrawal will not reduce flows or levels below essential minimums necessary (A) to assure the maintenance of fisheries requirements, and (B) to protect federal and state interests

including, among others, power generation, navigation, and existing water rights. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Under RCW 90.44.050, exempt groundwater uses (less than 5,000 gallon per day on less than one acre) are to be accorded treatment and entitled to a right equal to that established by a permit. Ecology is required, therefore, to consider established exempt groundwater uses as existing rights under RCW 90.03.290. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994).

A supplemental water right can only be used where the primary right goes unfulfilled. Center for Environmental Law & Policy, et al. v. DOE, PCHB Nos. 96-204 and 96-207 (1996).

In the context of a permanent change application, a temporary change may be granted pursuant to RCW 90.03.250, made applicable to groundwater by RCW 90.44.060. The criterion of RCW 90.03.250 for temporary change is that there be a "proper showing" which is construed to mean a showing which establishes a probability of success in meeting the ultimate criteria for permanent change, set forth in RCW 90.44.100. Andrews v. DOE, PCHB No. 97-20 (1997).

Ecology is authorized under RCW 43.27A.120 to issue appropriate cease and desist orders to enforce RCW 90.03.250. Lewis v. DOE, PCHB Nos. 96-272 and 96-273 (1997).

C. INVESTIGATION BY DEPARTMENT OF ECOLOGY

Ecology may follow a Fisheries Department recommendation against permit issuance, but is not compelled to do so. Such a recommendation does not necessarily preclude permit issuance if the permit meets the requirements of the law. RCW 90.03.290 requires Ecology to conduct an independent investigation of the effects of granting a permit. Kellogg v. DOE, PCHB No. 301 (1973).

Investigations by responsible agencies which comply with RCW 90.03.290 may be adopted by Ecology as the basis for approval or disapproval of appropriation applications. Rose v. DOE, PCHB No. 932 (1976).

In management of groundwaters, Ecology must initially assess the potential risk to prior appropriators and/or to the groundwater body in determining the intensity of study which is reasonable for a particular application. Heer v. DOE, PCHB No. 1135 (1977).

Long delay by the agency in completing its investigation does not estop it from denying an application. Ballestrasse and Chaves v. DOE, PCHB No. 78-51 (1978).

When Ecology's investigative report (Report of Examination) does not provide a fully accurate determination of a spring's existing flows and of the performance of the existing delivery system, an application for new group domestic use of water from the same spring may be remanded to the agency for further evaluation. Melotte v. DOE, PCHB No. 84-195 (1984).

Ecology's investigation of applications should be thorough. When potentially critical new information becomes available between the time of Ecology's decision and the PCHB's appeal hearing, it is appropriate to remand the matter to Ecology for supplemental investigation. Millward v. DOE, PCHB No. 83-80 (1984).

The requirement for Ecology to investigate an application does not necessarily require extensive independent studies by the agency to develop additional data. The law is satisfied when the agency has considered the physical situation, the status of established rights and sufficient information to make a reasoned and informed judgment. Whitebluff Prairie Coalition v. DOE, PCHB No. 86-5 (1986).

In an appeal to the PCHB, the agency's decision on an application must stand or fall on the facts presented at the PCHB's de novo hearing. The passage of time between the field examination and the agency decision has no significance in and of itself. Madrona Community v. DOE, PCHB No. 86-65 (1987).

RCW 90.03.290 requires the issuance of a permit only if Ecology can answer affirmatively all the statutory criteria. Where a well owner insists that Ecology process his application in an area where applications are being held pending the outcome of studies, Ecology may deny the application under the public interest criterion. Black Star Ranch v. DOE, PCHB No. 87-19 (1988).

As long as Ecology's judgment is based on credible factual information supporting its conclusions, its statutory investigative duties have been fulfilled. For Ecology to rely on an applicant' s consultant's report in reaching its decision presents only an ordinary credibility question. Cassady v. DOE, PCHB No. 87-66 (1987).

Irrigation districts may not discriminate against general water users by creating water preference rights in favor of certain users who sign up and

pay for special water uses. Neubert v. Yakima-Tieton Irr. Dist., 117 Wn.2d 232, 814 P.2d 199 (1991).

When deciding whether to issue a water permit, Ecology's investigation involves a tentative determination of the existence of water rights and the availability of water; Ecology's authority is limited to determining whether the proposed use conflicts with existing or claimed water rights. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

In the course of its investigation of appellant's application, Ecology must tentatively determine the existence of water rights and availability of water. Deatherage v. DOE, PCHB No. 93-264 (1994).

The permit decision involves the exercise of discretion which the Legislature has assigned to Ecology's good judgment. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Where an application to divert water is filed, Ecology is responsible for investigating the application and determining what water, if any, is available for appropriation, and to what beneficial uses it may be applied. Petersen v. DOE, PCHB No. 94-265 (1995).

Ecology is obligated by law to issue a water rights permit where an application is filed, water is available, and the appropriation will not impair existing rights or the public welfare. Petersen v. DOE, PCHB No. 94-265 (1995).

RCW 90.03.240 of the Water Code governs new appropriations of water and directs Ecology to investigate water rights applications to determine what water is available for appropriation and, if the beneficial use is irrigation, what lands are capable of irrigation. Porter v. DOE, PCHB No. 95-44 (1996).

If upon investigation Ecology determines that: 1) water is available for appropriation for a beneficial use; 2) the appropriation will not impair existing water rights; and 3) the appropriation will not be detrimental to the public welfare, Ecology "shall issue a permit." Porter v. DOE, PCHB No. 95-44 (1996).

RCW 90.03.290 governs applications for new appropriations of water and directs Ecology to investigate the application to determine what water, if any, is available and to determine to what beneficial uses it can be applied. Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

Ecology must consider how granting new withdrawals would affect the ability of local water supplies to accommodate anticipated increases in

population growth or what the cumulative impacts of the project and growth would be. Ecology must evaluate whether the local water supply is sufficient to support anticipated population growth in light of increased demand from diversions. Furthermore, Ecology must consider the cumulative impacts of new rights and existing and future demand from exempt wells and reasonably foreseeable development projects, either independent of or prompted by the project's development. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

Ecology must consider the potential adverse impacts of new withdrawals on water flows in its decision to grant applications so as to be consistent with past actions. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

Ecology may batch process multiple applications for groundwater appropriation permits within the same watershed so long as each applicant is provided a meaningful opportunity to contest Ecology's proposed factual findings. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

1. AVAILABILITY OF WATER

General

When withdrawals from a lake for a park will not interfere with recreational uses by patrons of an established resort, water is available for the proposed withdrawal. Myers v. DOE and Spokane Parks, PCHB No. 70-23 (1971).

No water is available for irrigation diversion where a stream's low flow level is detrimental to existing fishery resources. Driver v. DOE, PCHB No. 792 (1975).

Where proposed increases in rate of withdrawal from established groundwater subarea would cause static water level declines faster than the rate of decline prescribed by regulation for the subarea, water is not available for appropriation. Phillips v. DOE, PCHB No. 79-73 (1980).

Under RCW 90.03.290 Ecology has authority to approve withdrawal of a lesser amount of water than applied for, but if the applicant on appeal can show that more water is in fact available, Ecology may be obliged to increase the amount approved. Cole v. DOE, PCHB No. 79-83 (1980).

Before a decision is made to close a stream absolutely to further appropriation, substantial unanswered questions concerning water availability should be resolved. Klover v. DOE, PCHB No. 80-150 (1981).

That a separate well system may be built to replace the existing source of supply does not provide a basis for refusing a permit increasing the existing sources' authorization to its actual level of appropriation. Cherokee Bay Park Community Club v. DOE, PCHB No. 81-89, (1981).

Ecology may deny an application for a new appropriation in a drainage where adjudicated rights exceed the average low flow supply, even if the prior rights are not presently being exercised. Water would not become available for appropriation until existing rights are relinquished for non-use by state proceedings. Denovan v. DOE, PCHB No. 83-215 (1984).

When three parties apply for a share of the waters of a single spring, and no basis appears for preferring one over another, Ecology can properly conclude that water is not available to any applicant who does not contribute his share to the development of additional storage. Napier & Sherman v. DOE, PCHB No. 84-299 (1985).

Surface waters derived from waste, seepage and return flows introduced by operation of a reclamation project are not unappropriated waters and, thus, are not available for appropriation, even when the proposed use is non-consumptive. U.S. Bureau of Reclamation v. Skane, PCHB No. 80-36 (1986).

Under the groundwater code, it is not appropriate for Ecology simply to allow a development, wait and see if a problem develops for other users and then seek to solve the problem by regulation. Where Ecology has completed a detailed study which concludes that the available water is fully appropriated, denial of applications is appropriate. Lamberton v. DOE, PCHB No. 89-95 (1990); Stout v. DOE, PCHB No. 89-99 (1990).

In order to maintain a "safe sustaining yield" for prior appropriators and "avoid" overdraft, the water availability question may involve a discretionary decision about mining groundwater. Appropriation in excess of annual recharge can be allowed only under circumstances where the ability of existing right holders to fully satisfy their rights by reasonable means can be guaranteed. Shinn & Masto v. DOE, PCHB No. 648 (1975); Stout v. DOE, PCHB No. 89-99 (1990); Lamberton v. DOE, PCHB No. 89-95 (1990); Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

Water availability criterion is given additional content in the groundwater context by RCW 90.44.070 which prohibits the granting of a permit for

"withdrawal of public groundwaters beyond the capacity of the underground bed or formation ... to yield such water within a reasonable or feasible pumping lift...." Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Ecology is required by statute to first find that water is available prior to issuing a permit, and to consider when doing so the interrelationship of the ground and surface waters. Summers v. DOE, PCHB No. 91-42 (1992).

Where Ecology has closed water bodies to further appropriation for consumptive use, any further appropriation could impair existing rights. As a matter of law, Ecology properly determined that there are no waters available for further appropriation for consumptive use, other than single domestic and stock water. Summers v. DOE, PCHB No. 91-42 (1992).

"Water mining" refers to the consumptive use of water beyond nature's ability to replace it. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

Applicants must show the existence of stored public groundwater before receiving a groundwater permit. Green, et al. v. DOE, PCHB Nos. 91-139, 91-141 & 91-149 (1992).

An examination by Ecology of available water concluding that there is currently no more water available for new appropriation should not be a barrier to an application to change the place of use of an existing water right. Pariseau v. DOE, PCHB No. 92-142 (1993).

RCW 90.03.290 requires Ecology to make a threshold determination of what water is available for appropriation. Pariseau v. DOE, PCHB No. 92-142 (1993).

Even if outstanding adjudication rights to the entire flow of a river exist, Ecology may still conclude that water is available if the owners of the water rights were not using their full measure. Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995).

Water used by vegetation, absent that vegetation, belongs to the public and is subject to the rights of prior appropriators. The public, as the beneficiary of regulatory base flows, where those flows currently are not being satisfied, has a first call on any water gain made from the removal of the vegetation. Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996); Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996).

Infiltrating runoff from man-made impermeable surfaces does not create "new water" for purposes of appropriation. Absent the impermeable surfaces, the water would naturally recharge the system and benefit the base flows of streams. No credit is merited nor authorized under the Water Code for returning to nature, what originally belonged to it. That water, similar to the water allegedly gained from deforestation, belongs to the public and is subject to the right of prior appropriators. Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

Water rights, once granted, are perpetual, while land uses are always changing. To grant a perpetual right based on one particular land use change at one point in time would burden future generations, as well as make legitimate prior appropriators mere bystanders at the dissipation of the resource. Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996).

To grant a perpetual right based on one particular land use change at one point in time would burden future generations, as well as make legitimate prior appropriators mere bystanders at the dissipation of the resource. Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996).

Ecology, by operation of law, may not credit a water right applicant with the water created as a result of vegetation changes. Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996).

Ecology, in assessing whether a use is consumptive, may not credit a water right applicant with the water used by vegetation removed from a site. Manke Lumber Co. v. DOE, PCHB Nos. 96-102, 96-103, 96-104, 96-105, 96-106 (1996); Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996).

Natural vegetation does not hold a water right. The amount of groundwater utilized by the natural vegetation is ever-changing. The water left in the ground at any point in time is merely a portion of the groundwater resource that belongs to the people of the state, subject to the rights of prior appropriators. Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996).

To say that an applicant can establish a water right where none would otherwise exist, merely by changing the vegetation, would gut the statutory scheme by which the Legislature has implemented the principle of first in time, first in right. Spurgeon Creek Finny Farm v. DOE, PCHB No. 96-113 (1996).

The use of septic systems, with resulting partial recharge of groundwater, should not be the basis for granting a perpetual right. Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996); Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996).

A water right applicant is not entitled to any credit for increasing recharge to groundwater, as a result of deforestation, nor through an attempt to create "new water" by infiltrating runoff from man-made impermeable surfaces. No credit is merited nor authorized under the Water Code for returning to nature, what originally belonged to it. Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996); Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

A water right applicant is not entitled to mitigation credit for proposals involving the capture and diversion of storm water runoff from impervious surfaces. L.G. Design, Inc. v. DOE, PCHB Nos. 96-20 and 96-25 (1997).

RCW 90.03.290, which governs groundwater appropriation permitting, does not require every application for a groundwater withdrawal be investigated individually in a strictly chronological order, only that applications for withdrawals within a given water source or watershed be considered in order of application. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Under RCW 90.03.290, which governs groundwater appropriation permitting, the state may conduct an assessment of a watershed or basin in advance of investigating and processing an application for the withdrawal of public groundwater. Such assessment is neither arbitrary and capricious nor beyond statutory authority if it is used as a means to investigate the availability of water and the rights already appropriated in a given basin or watershed. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Ecology may not credit a water right applicant with any reduction in water used by vegetation resulting from the removal of vegetation at its site. An applicant is not entitled to offset any return flow from septic systems against its proposed groundwater withdrawal. L.G. Design, Inc. v. DOE, PCHB Nos. 96-20 and 96-25 (1997).

An applicant is not entitled to any credit for increasing recharge to the groundwater as a result of deforestation. Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

Anticipated septic tanks on a site would mitigate the proposed withdrawal provides an inadequate basis for granting a perpetual water right. Septic systems are often temporary and later replaced by sewers. Oetken v. DOE, PCHB No. 96-42 (1997).

Anticipated septic tanks on a site provide an inadequate basis for granting a water right under RCW 90.03.290. Water returned to a system through septic system effluent is deteriorated in quality contrary to statutory prohibitions contained in RCW 90.54.020(3)(b). Oetken v. DOE, PCHB No. 96-42 (1997).

The PCHB has generally approached the issue of availability as a matter of physical presence of water in the stream or aquifer and the ability of the aquifer to support a sustained yield. Conflicts over the ownership or priority of use for water physically present in a stream or aquifer have been analyzed under the impairment and public welfare prongs of the test enunciated in RCW 90.03.290(3). Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

"Stream closures by rule embody Ecology's determination that water is not available for further appropriations." Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Where a stream has been closed due to unavailability, the four-part statutory test cannot be met and the water right application should be denied. Simmons v. DOE, PCHB Nos. 99-099, -196, -202, 00-002, -110, and 00-175 (2001).

Natural and Artificially Stored Groundwater

"Natural" and "Artificially Stored" groundwater are statutorily defined terms. In general, artificially stored groundwater is water, present because of human activity rather than natural processes, which remains subject to recapture and use by the storer. RCW 90.44.130 sets forth a process by which claims to ownership of artificially stored groundwater may be filed and accepted or rejected by Ecology. Artificially stored groundwater is not public groundwater available for appropriation under the statutory permit program of chapter 90.44 RCW. However, in the Quincy Basin a separate permit program for use of artificially stored groundwater is administered jointly by Ecology and the United States Bureau of Reclamation. See chapters 173-134A and 136 WAC. (WD).

Ecology's ruling on a declaration of artificially stored groundwater in the Quincy Groundwater Subarea was merely the remaining governmental action needed to account for groundwater in the locality after creation of

the subarea. Nothing Ecology could decide would alter what was physically constructed prior to the effective date of SEPA. SEPA is not applicable to projects that, before its effective date, reached a critical stage of completion precluding consideration of environmental protection desired by the Act. Van Holst v. DOE, PCHB No. 798-A (1976).

A historic failure to exercise the right of recapture by one whose water seeps into bogs on the land of another implies abandonment of artificially stored groundwaters and said waters are available for appropriation. RCW 90.44.040. Simpson v. DOE, PCHB No. 846 (1976).

"Management units" established to differentiate as to quantity between commingled federal "artificially stored groundwater" and state "public groundwater" do not distinguish separate "bodies of public groundwater." Shinn v. DOE, PCHB No. 1117 (1977).

Denial of applications for artificially stored groundwater under special program established by regulation in Quincy Basin was appropriate where withdrawals were within buffer zone in direct hydraulic continuity with Pot Holes Reservoir, notwithstanding that buffer zone boundaries were not determined until after the applications were filed. Applicants in this situation had no vested right to be free of buffer zone restriction. Goodwin v. DOE, PCHB No. 821 (1978).

In a small aquifer fed only by precipitation, water is not available for irrigation where withdrawals for such use would exceed annual recharge. Green v. DOE, PCHB No. 79-184 (1980).

In the shallow management unit of the Quincy Groundwater Subarea, evidence supports the conclusion that the naturally occurring groundwater has been allocated quantitatively by permits or certificates. Therefore, no public groundwater is available and the remaining groundwater encountered is artificially stored groundwater. Jensen v. DOE, PCHB No. 80-96 (1981).

Artificially stored groundwaters are secured by declaration under RCW 90.44.130. Rights to artificially stored groundwaters are "existing rights" with the meaning of 90.03.290. Public groundwater appropriations cannot impair existing lights. Jensen v. DOE, PCHB No. 80-96 (1981).

Artificially stored groundwater may become public groundwater upon being abandoned or forfeited. Artificially stored groundwater is not abandoned by being commingled with naturally occurring groundwater, when the ground is simply being used to convey groundwater to recapture facilities. Jensen v. DOE, PCHB No. 80-96 (1981).

Groundwater is not available for irrigation where the aquifer contributes to the water supply in an adjudicated stream which has been closed to further irrigation appropriations by published agency regulation. Hacker v. DOE, PCHB No. 814 (1981).

A permit may be issued where a particular development will not result in overdraft of the aquifer to the point that prior users will be unable to obtain water at reasonable depths. However, where there are indications of declining water levels in existing wells, Ecology should learn more about the size and behavior of the aquifer before allowing further substantial increases in withdrawals. Regulation of pumping may come too late to do any immediate good where regional overdraft is the problem. Keck v. DOE, PCHB No. 88-148 (1989).

For small, shallow aquifers with limited storage the decision to limit withdrawals to average annual recharge is prudent. Lamberton v. DOE, PCHB No. 89-95 (1990); Stout v. DOE, PCHB No. 89-99 (1990).

Reasonable and Feasible Pumping Lift

RCW 90.44.070 prohibits granting of permits only when the pumping lift becomes unreasonable or not feasible as to "pumping developments" generally. Shinn v. DOE, PCHB Nos. 613, 648 (1975); Fode v. DOE, PCHB No. 803 (1976).

The effect of RCW 90.44.070, where Ecology is required to determine a range of reasonable pumping lifts, is to prohibit the issuance of further groundwater permits until that determination is made. Pierret and Heer Brothers v. DOE, PCHB No. 894 (1976).

The additional statutory provision of RCW 90.44.130 that a "safe sustaining yield from the groundwater body" be maintained provides for reconciliation of rights of appropriators in the event of threatened overdraft. It is not an element of water availability which is a prerequisite for initially granting a permit. Heer v. DOE, PCHB No. 1135 (1977).

Where withdrawals are exceeding recharge, water levels and pumping depths will decline and accompanying costs will increase. While no permitee is guaranteed his amount of water at a specified pumping depth, the range within which he can be expected to pump to obtain his authorized gallons is required to be "reasonable and feasible." Heer v. DOE, PCHB No. 1135 (1977).

Where there is neither a detrimental effect on an existing well nor a substantial cumulative increase in pumping lifts in an area, RCW 90.44.070 does not require Ecology to make a prior determination of the

range of reasonable or feasible pumping lifts for an area. Savaria v. DOE, PCHB No. 77-20 (1977); Pair v. DOE, PCHB No. 77-189 (1978).

Even though prior rights under the small withdrawal exemption to the permit requirements may exist, Ecology need not establish a range of pumping lifts where the claimed rights are not being exercised. Brownell v. DOE and Williams, PCHB No. 78-197 (1979).

2. IMPAIRMENT OF EXISTING RIGHTS

Generally

Restrictions on groundwater withdrawal may avoid conflicts with existing rights where water availability is limited. Williams v. DOE, PCHB No. 70-9 (1971).

Interference with historically established and ongoing stock watering use of a stream is a proper basis for denial of a proposed group domestic diversion. Scheibe v. DOE, PCHB No. 36 (1972).

If the conditions of RCW 90.03.290 are met when an application is evaluated, a permit may issue, notwithstanding assertion that issuance of future permits to similar applicants would prejudice existing rights. Gahringer v. DOE and Berg, PCHB No. 147 (1973).

Withdrawal of .04 cfs from a year-round creek with a low flow of .19 cfs would have no appreciable effect on a downstream 135,000 gallon pond. Such a withdrawal for domestic supply would not impair existing rights. Doolittle v. DOE, PCHB No. 193 (1973).

Historic riparian cattle watering rights are existing rights which must be protected in appropriation proceedings. McMamama v. DOE, PCHB No. 763 (1975).

Withdrawal of groundwater in direct hydraulic continuity with fully appropriated surface waters may be denied on the basis of unlawful impairment of rights. Olsen v. DOE, PCHB No. 78-58 (1978); Zwar v. DOE, PCHB No. 78-233 (1979).

Non-consumptive use of water for a hydro-electric project was not shown to impair existing rights to downstream springs absent proof that an adverse effect on recharge of the springs was more likely than not. Hurst and Davis v. DOE & Eatonville, PCHB No. 81-208 (1982).

Well-casing requirement for deep irrigation well can render unlikely its interference with rights in shallow upper aquifers. Frost Valley Farms v. DOE, PCHB No. 82-109 (1982).

Denial of proposed appropriations upstream of the senior adjudicated right on a stream was justified where the senior users' ability to satisfy his full right had already been impaired by reduction of streamflow formerly contributed by losses from a reclamation district. Bohart v. DOE, PCHB No. 82-173 (1983).

Where existing rights exceed estimated annual water budget for a small groundwater basin, approval of further irrigation development would violate water code. Frazier v. DOE, PCHB No. 83-52 (1983).

If waters of a stream are fully appropriated at low flow, diversions on tributaries may be denied on grounds that the reduction in contribution to the mainstream would impair existing rights. Denovan v. DOE, PCHB No. 83-215 (1984).

The priority system and permit conditions regarding well construction and monitoring can avoid impairment of existing rights. Eacrett v. DOE, PCHB No. 84-257 (1985).

Where withdrawals under eight permits for fire protection and lawn and garden watering on lake-front residential properties would have no significant effect on fishing & boating or swimming uses of the lake, existing recreational rights of resort owner would not be impaired. Myers v. DOE, PCHB No. 84-183 (1986).

Where a small diversion from a spring above a gaining watercourse would not measurably affect the availability of water for downstream right holders or for instream flows, Ecology did not err in failing to include a low flow cut-off in a permit for stockwater. Landberg v. DOE, PCHB No. 85-234 (1986).

Where appellant's well and permitee's well withdraw from different and unrelated aquifers, existing rights will not be impaired. Cassady v. DOE, PCHB No. 87-66 (1987).

Relevant to the public interest in evaluating an application for a new surface water right was the possible detrimental effect that the use of the existing well water for irrigation might have on neighboring drinking water. Steffans v. DOE, PCHB No. 92-1 (1992).

The impact that a beneficial use of water has on the water source and its flora and fauna is not a basis for impairing an existing water right. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Although it was small, the stream was historically fed by the spring. Because there is an abundance of water, replacement of the stream will not adversely affect existing rights. Stenback v. DOE, PCHB No. 93-144 (1994).

Temporary interference that is cured by regulation does not rise to the level of legal interference with senior water rights sufficient to warrant denying the permit. Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995).

A possible delay in regulation of a few days, when a problem arises, is not tantamount to legal interference with another's water right sufficient to bar DOE's issuance of the permit. Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995).

Granting groundwater applications, the source of which is in hydraulic contiutity with regulated waters which are either closed or not meeting base flows for part of the year, would adversely affect the closures, the base flows and the values they were designed to protect. Granting the proposed applications would, as a matter of law, constitute an impairment of existing rights, contrary to the Water Code. Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996); Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996); Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996); Jorgenson v. DOE, PCHB No. 96-57 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The closure of a basin by rule constitutes a legal determination that further appropriations would impair existing rights and instream values protected by statute. Schrum v. DOE, PCHB No. 96-36 (1996); Northeast Sammamish Water and Sewer District v. DOE, PCHB No. 96-146 (1996); Oetken v. DOE, PCHB No. 96-42 (1997); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997); Jorgenson v. DOE, PCHB No. 96-57 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

As a matter of law, Ecology may not grant an application to withdraw groundwater, for consumptive use, which is in hydraulic continuity with a surface water in which minimum instream flows set by rule are not being met. Black River Quarry, Inc. v. DOE, PCHB No. 96-56 (1996); Covington Water District v. DOE, PCHB Nos. 96-72, 96-73 & 96-74 (1996);

L.G. Design, Inc. v. DOE, PCHB Nos. 96-20 and 96-25 (1997); Evergreen Golf Design v. DOE, PCHB No. 96-8 (1997); Sebero v. DOE, PCHB No. 96-126 (1997); Kiewert v. DOE, PCHB No. 96-157 (1998); Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Even though the necessary data on the Applicant's well was submitted to the agency over a period of time, that data proves that the Applicant's well does not increase the risk of seawater intrusion--even during the summer--so that the application does not impair existing rights or run afoul of the public interest. Porter v. DOE, PCHB No. 95-44 (1996).

Given the possibility that the more water could be withdrawn under a water right than permitted in the superseding certificate, RCW 90.44.100 gives Ecology the clear authority to require installation of metering devices. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Ecology's imposition of metering does not impair in any way appellants' water rights. Impairment must be "a substantial as distinguished from a mere technical or abstract damage" Hutchins, Water Rights Laws in the Nineteen Western States, Vol. II, at 193 (1974), and does not preclude reasonable regulation of a right. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Appropriations must be denied where they would impair existing rights or where water is not available. Moss, et al. v. DOE, PCHB Nos. 96-138, 96-156, 96-163, 96-166, 96-181 (1997).

A new appropriation of water for a consumptive use may not be granted where the use would impair existing rights. Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997); Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997); Evergreen Golf Design v. DOE, PCHB No. 96-8 (1997); Jorgenson v. DOE, PCHB No. 96-57 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

For purposes of determining if a proposed use of groundwater will impair an existing right, Ecology is authorized to tentatively determine the existence of any senior water rights. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Where minimum flow reservations are in effect, even relatively small diversions of surface water would constitute impairment. Strobel v. DOE, PCHB No. 96-52 (1997).

Given the data establishing inadequate flows during the summer months to fulfill minimum instream flows and existing certificated rights, further

diversion of water would constitute an impairment of the public's existing rights and the instream values minimum flows are designed to protect, contrary to RCW 90.03.290. Cheney v. DOE, PCHB No. 96-186 (1997).

Regulation both between senior and junior appropriators and between the public interest in instream flows and appropriators can be a tool to prevent an attenuated risk of impairment. Strobel v. DOE, PCHB No. 96-52 (1997); Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995); Chandler v. DOE, PCHB No. 96-35 (1997).

Water quantity is directly related to water quality, velocity, temperature, reoxygenation and dilution capability. Granting proposed consumptive water right upstream which would aggravate serious water quality downstream, would be detrimental to existing instream users and the public welfare in violation of RCW 90.03.290. Cheney v. DOE, PCHB No. 96-186 (1997); Oetken v. DOE, PCHB No. 96-42 (1997); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

RCW 90.44.100 embodies a principle of water law that arises in the surface water context, and applies to groundwater by virtue of RCW 90.44.020: The exercise of the privilege changing a water right is generally permitted by legislation and court decisions, but with important exceptions. The appropriator is entitled to have the stream conditions maintained substantially as they existed at the time he made his appropriation. This applies equally to senior and junior appropriators. Not only is the senior appropriator entitled to protection against any impairment of his right by those who come later; the junior appropriator initiates his right in the belief that the water previously appropriated by others will continue to be used as it is then being used. Therefore, the junior appropriator has a vested right, as against the senior to insist that such conditions be not changed to the detriment of his own right. Andrews v. DOE, PCHB No. 97-20 (1997).

Ecology is under a duty to reject the applications under RCW 90.03.290 where the volumes would reduce the water available to prior appropriators downstream, and the withdrawals would impair existing rights. Vanderhouwen v. DOE, PCHB Nos. 94-108, 94-146 & 94-231 (1997).

Where base flows are not being met, the water body must be treated in the same manner as streams subject to outright closure and no additional groundwater rights in hydraulic continuity may be granted without impairing the existing right to adequate instream flow. Jorgenson v. DOE, PCHB No. 96-57 (1997); Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

As the purpose of the water code is the prevention of impairment, Ecology effectively refrains from granting new water rights where the risk of impairment can only be avoided by regulation. Chandler v. DOE, PCHB No. 96-35 (1997).

Ecology properly considered the cumulative impact of such diversions as well as exempt wells water quality in denying an application. Chandler v. DOE, PCHB No. 96-35 (1997).

DOE lacks authority to require a water right holder to use its water right to irrigate its lands." Thurlow v. DOE, PCHB 00-189 (2001).

Instream Flows

A permit conditioned on maintaining a minimum flow sufficient to protect prior users downstream does not impair existing rights. Bogstad v. DOE, PCHB No. 539 (1975).

Ecology may regulate groundwater withdrawal for the purpose of keeping a river's base flow intact. Richert v. DOE, PCHB No. 90-158 (1991).

Ecology promulgated chapter 173-500 WAC as the backbone of its comprehensive state water program to "provide a process for making decisions on future water resource allocations and uses." Chapter 173-522 WAC limited future allocation of water by establishing base flows on many streams and creeks, and recognizing the closure of and closing additional streams, creeks and tributaries to future consumptive appropriations. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

Groundwater affecting surface water in regulated streams is subject to the same restrictions as surface water in basins where minimum instream flows have been set by rule. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The fact that the water has been over appropriated is not in and of itself relevant to the extent that existing valid rights are at issue. It may well be true that any continued use of water is detrimental to the instream flows necessary sustain dwindling stocks of salmon, but that fact does not figure into the determination of whether an existing right may be changed without adversely impacting other existing rights under RCW 90.03.380. The issue is whether the specific transfer and, in this case, consolidation of rights, will have an increased impact on the river. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

Where base flows in a closed basin are not being met, and where groundwater pumping is contributing to that phenomenon, any further withdrawal of groundwater, which is in hydraulic continuity with the surface waters for which such base flows have been set, will, as a matter of law, constitute an impairment of existing rights, contrary to the Water Code. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

Ecology's adoption of a rule which closed the surface waters in the basin to further appropriation constitutes a determination that further appropriations would impair existing rights and instream values protected by statute. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996); Union Hill Water And Sewer District v. DOE, PCHB No. 96-94 (1996); Herzl Memorial Park v. DOE, PCHB No. 96-54 (1996); Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Where surface waters have been closed by rule to further appropriation, and a proposed groundwater withdrawal is in hydraulic continuity with any of those surface waters, Ecology may rely on that closure by rule to deny a groundwater application so as to prevent impairment of senior rights and instream values protected by statute. Union Hill Water And Sewer District v. DOE, PCHB No. 96-94 (1996); Schrum v. DOE, PCHB No. 96-36 (1996); Postema v. DOE, PCHB No. 96-101 (1997); Tulalip Tribes of Washington v. DOE, PCHB No. 96-170 (1997).

As there is at present inadequate flows to fill the public's instream flow rights, a proposed diversion of surface water, even though relatively small in quantity, would constitute a further impairment of the public's existing rights and further diminish the instream values that the minimum flow reservations were designed to protect, contrary to RCW 90.03.290. Chandler v. DOE, PCHB No. 96-35 (1997).

Where there is any hydraulic continuity and minimum stream flow is not being met, the stream is closed to further appropriations for consumptive use. Ecology may not grant an application to withdraw groundwater, for consumptive use, which is in hydraulic continuity with a surface water in which minimum instream flows set by rule are not being met. Wells v. DOE, PCHB No. 96-82 (1997); Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997); Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997).

The rule creating minimum flows established a water right for the public, given the data establishing inadequate flows during the summer months to fulfill minimum instream flows and existing certificated rights. Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

Where base flows are not being met, the water body must be treated in the same manner as streams subject to outright closure. No additional groundwater rights in hydraulic continuity may be granted without impairing the existing right to adequate instream flow. Kiewert v. DOE, PCHB No. 96-157 (1998).

In Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983), the PCHB distinguished between appropriations which might conflict with instream flows set by regulation, and those which would not. The former are subject to the "overriding considerations of public interest" standard of RCW 90.54.020(3)(a). The latter are subject only to the "maximum net benefits" standard of RCW 90.54.020(2). Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

DOE lacks authority to require a water right holder to use its water right to irrigate its lands." Thurlow v. DOE, PCHB No. 00-189 (2001).

Effect on Pumping Lifts

To prove an impairment of an existing certificated water right, the right holder must show that she could not get, to the limits of her right, a safe sustaining yield at a reasonable or feasible pumping lift from the groundwater body if the new permit is granted. Wedrick v. DOE, PCHB No. 823 (1975).

Before issuing a water permit which could affect a prior water right, Ecology must determine a range within which pumping lifts would be reasonable as to existing wells. Simpson v. DOE, PCHB No. 846 (1976); Pierret and Heer Brothers v. DOE, PCHB No. 894 (1976).

The fact that issuance of new permits would create a drawdown in existing wells is not sufficient reason to deny an application. Such a drawdown does not necessarily impair existing rights of those whose wells will suffer a lowered pumping level. Shinn v. DOE, PCHB Nos. 613, 648 (1975); Fode v. DOE, PCHB No. 803 (1976).

A predicted effect of one-inch of drawdown in appellants' wells would not cause the reasonable or feasible pumping lift to be exceeded. Andrews and Peterson v. DOE, PCHB No. 77-4 (1977).

In the case of wells, impairment means the reduction of an existing well's water level below a reasonable, feasible pumping lift. What is reasonable and feasible depends on economics as well as other factors. Pair v. DOE, PCHB No. 77-189 (1978).

Where an irrigation appropriation has a seasonal effect on the yield of a domestic well, but the regional water table recovers after the pumping season, the existing right of the domestic user is not necessarily impaired. Where there is sufficient water available at all times to satisfy the domestic right, the domestic user may have to bear the expense of deepening his or her well. Hennings v. DOE, PCHB No. 84-173 (1984).

Impairment of an existing groundwater right does not necessarily occur when a junior appropriator lowers the water level at the site of a senior appropriator's well. Senior appropriators must deepen their wells to the point where the water level is found, unless to do so would exceed a reasonable or feasible pumping lift. Were this not so, a senior appropriator with a shallow well could deprive all others from using the available groundwater. Graves v. DOE, PCHB No. 88-140 (1989).

Water Quality

If the appropriation of water from a common aquifer by one having an inferior right causes the aquifer to be fouled by the intrusion of salt water, prior rights in the aquifer will have been impaired. Hillcrest Water Assoc. v. DOE, PCHB No. 80-128 (1981).

3. PUBLIC INTEREST REVIEW

Aesthetic values and recreational uses are protected under the public interest criterion of the water code. Irrigation may not be in the public interest when such values and uses are interfered with. Little Spokane Community Club v. DOE, PCHB No. 70-7 (1973).

A permit condition requiring maintenance of a minimum flow in order to preclude a detriment to the public welfare is acceptable. Bogstad v. DOE, PCHB No. 539 (1975).

Waste of limited water resources is detrimental to the public welfare. Franz v. DOE, PCHB No. 558 (1975).

A limited and controlled rate of water level decline is not necessarily detrimental to the public welfare. Shinn v. DOE, PCHB Nos. 613, 648 (1975).

The economic impact on a water district which results from granting appropriation rights to persons who would otherwise use the district's facilities could, under certain circumstances, be detrimental to the public welfare. Wallula Water District No. 1 v. DOE, PCHB No. 976 (1976).

"Public Interest" must be interpreted by reconciling the dual objectives of the statutory policies: protection of the groundwater supply and its full utilization as a valuable resource. Heer v. DOE, PCHB No. 1135 (1977).

The public interest criterion does not preclude the issuance of a permit where the permitee intends eventually to sell the land to which the water is appurtenant. Heer v. DOE, PCHB No. 1135 (1977); Bar U. Ranch v. DOE, PCHB No. 77-63 (1977).

Prior to amendment (change of location or purpose) of a groundwater permit or certificate, RCW 90.44.100 requires findings "as prescribed in the case of an original application." This makes the "public welfare" criterion of RCW 90.03.290 relevant. Sparks v. DOE, PCHB No. 77-43 (1977).

The "public welfare" requirement of RCW 90.03.290 does not require Ecology to resolve issues of access to private property prior to approving a groundwater permit. Brownell v. DOE and Williams, PCHB No. 78-197 (1979).

Neighbors' fear of future decline in property values does not provide basis for overturning decision to grant groundwater permit for adjacent property. East Hill Community Well Co. v. DOE, PCHB No. 79-96 (1979).

A proposed surface water diversion for irrigation is likely to prove detrimental to the public interest if evidence shows further appropriation of creek water would result in lowering flow necessary to adequately support existing food and game fish population. Coon v. DOE, PCHB No. 79-74 (1980).

Where no public water is presently available, but applications are being retained for priority purposes, an applicant's insistence that Ecology rule on his application necessitates its denial as detrimental to the public welfare. To allow the applicant to leap over all senior applications would threaten orderly water management. Jensen v. DOE, PCHB No. 80-96 (1981); Black Star Ranch v. DOE, PCHB No. 87-19 (1988).

The issuance of a permit to a new water purveyor for a residential subdivision already served from another source is not necessarily contrary to the public interest. Relevant considerations are whether water is physically available at the new locale and can be withdrawn without interference with prior rights, whether the total amount of water used will be increased, and whether users of the new system will relinquish their interest in the old one. Sisson v. DOE, PCHB No. 82-25 (1982); Vehrs v. DOE, PCHB No. 82-36 (1982).

A withdrawal for a single family's domestic use in the watershed providing the municipal supply for a town is not detrimental to the public welfare where the applicant will provide on-site wastewater treatment and health authorities do not object. Such approval is not invalid because of the possibility it may serve as a precedent for further development. Town of Ione v. DOE, PCHB No. 82-184 (1983).

Ecology may exercise its authority under the water pollution control laws to limit or control groundwater withdrawals which cause or tend to cause pollution. Such limitations may be necessary to conform a permit to the public welfare requirement of the water appropriation statutes. Wilbert v. DOE, PCHB No. 82-193 (1983).

Under chapter 90.54 RCW living streams must be maintained with or without minimum flows being established by regulation. This is an appropriate public interest consideration and can serve as the basis for limiting approvals to less than applied for. Warner v. DOE, PCHB No. 83-62 (1984).

Where streams' waters in low flow conditions appear fully allocated to prior users and established instream flows, and reasonable alternate water sources are available, the public interest justifies rejection of even very minor diversions. Delzer v. DOE, PCHB No. 83-210 (1984).

Where preliminary inquiry provides no reason to think that groundwater contamination is a probable result of well development for community domestic supply, the public interest criterion is satisfied by conditioning commencement of withdrawals on receipt of relevant approvals by public health officials. Whitebluff Prairie Coalition v. DOE, PCHB No. 86-5 (1986).

The "public welfare" clause of the Water Code does not require Ecology to determine compliance with county health, zoning and planning ordinances in the permit approval process. Whitebluff Prairie Coalition v. DOE, PCHB No. 86-5 (1986).

The purported ineffectiveness of Water Code enforcement in remote areas provides no basis for denying a permit application. A member of the public who can satisfy the statutory permit criteria is not prevented from appropriating water because the state's system of enforcement is short of manpower. Madrona Community v. DOE, PCHB No. 86-65 (1987).

Detriment to the public welfare may be avoided by dam safety requirements included in a reservoir permit. Rumball v. DOE, PCHB No. 86-127 (1987).

Where there is a "possibility" that well development might result in salt water contamination of a domestic supply aquifer, the development "threatens to prove detrimental to the public interest," unless testing and monitoring provisions clearly adequate to prevent such contamination are imposed upon the water right. Hillcrest Water Assoc. v. DOE, PCHB No. 80-128 (1981); Bryant v. DOE, PCHB No. 87-245 (1988); Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Where chronic water shortages have resulted in three water rights adjudications in a basin and reduced flows are depressing fish populations, even very minor irrigation applications may validly be denied. Though the effect of one small diversion may not be noticeable in isolation, the allowance of many such diversions would have a substantial impact. The potential for cumulative impacts may sustain a denial on public interest grounds. Byers v. DOE, PCHB No. 89-168 (1990); Holubar v. DOE, PCHB No. 90-36 (1990).

"Potential uses and users" in the maximum net benefits language in RCW 90.54.020(2) relates to future uses established subsequent to the required establishment of base flows. The base flows are intended to protect existing instream uses. Richert v. DOE, PCHB No. 90-158 (1991).

There is a strong public interest and law weighing in favor of protecting fish habitat. Richert v. DOE, PCHB No. 90-158 (1991).

Relevant to the public interest in evaluating an application for a new surface water right was the possible detrimental effect that the use of the existing well water for irrigation might have on neighboring drinking water. Steffans v. DOE, PCHB No. 92-1 (1992).

A requested permit would detrimentally affect the public welfare unless existing rights, including the base flow in a river, are protected. Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

The public interest includes an examination of the net benefits from diversionary uses and retention of waters within streams. In this regard consideration should be given to the cumulative impact of similar requests that might be made in the future. Fleming, et al. v. DOE, PCHB Nos. 93-322, 94-7, & 94-11 (1994).

Ecology has authority to protect the public interest through regulations that: "(1) reserve and set aside waters for beneficial utilization in the future, and (2) when sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are

available." Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

RCW 90.54.020 of the Water Resources Act states that preserving base flows in rivers and streams is fundamental to managing Washington's waters and prohibits new consumptive uses of water that would interfere with those base flows. Ecology cannot issue a water permit until base flows are set for the reach. Bergevin, et al. v. DOE, PCHB Nos. 94-192, 94-194, 94-197, 94-199, 94-200, 94-201, 94-202, 94-203, 94-204, 94-205, 94-206, 94-207, 94-211, 94-212 (1995).

A new appropriation of groundwater would constitute an impairment of existing rights and detriment to public welfare where surface water is over appropriated and closed to further appropriation. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

Appellant's application must accordingly be denied where it requests groundwater in continuity to surface water closed to future appropriations as to do otherwise would impair existing rights and cause detriment to the public welfare. Schrum v. DOE, PCHB No. 96-36 (1996).

Applicants seek this water right to commit this land to agricultural use in perpetuity and are in the process of transferring the development rights to this land. Reserving this land for agricultural use concurrently preserves it as an aquifer recharge zone--an indisputable benefit to water quality. Porter v. DOE, PCHB No. 95-44 (1996).

Even though the necessary data on the Applicant's well was submitted to the agency over a period of time, that data proves that the Applicant's well does not increase the risk of seawater intrusion--even during the summer--so that the application does not impair existing rights or run afoul of the public interest. Porter v. DOE, PCHB No. 95-44 (1996).

The quantity of water present in a stream is a major factor affecting the success of fish populations. The further decline in available water resulting from the Appellants withdrawal would impair the public interest in maintaining viable habitat and migration corridors for anadromous and resident fish in the immediate area and downstream of the withdrawal, in violation of RCW 90.03.290. Oetken v. DOE, PCHB No. 96-42 (1997).

Further degradation of water quality would be detrimental to existing instream users and the public welfare in violation of RCW 90.03.290. Water quantity is directly related to water quality, velocity, temperature, reoxygenation and dilution capability. Granting a consumptive water right in hydraulic continuity with a creek tributary to an impaired water

body would decrease the amount of water in the stream and worsen the serious existing water quality problems on the river. Oetken v. DOE, PCHB No. 96-42 (1997); Strobel v. DOE, PCHB No. 96-52 (1997).

RCW 90.03.290 provides that where a proposed use of water "threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the waters belonging to the public, it shall be the duty of Ecology to reject such application and refuse to issue the permit asked for." This provision of the surface water law applies as well to groundwater withdrawals. Cascade Investment Properties, Inc., et al. v. DOE, PCHB Nos. 97-47 & 48 (1997).

Granting a water right to a water purveyor that would serve residents of a subdivision lying within a City's UGA would be inconsistent with statutory language and detrimental to the public interest: Purveyor fell within second portion of RCW 90.54.020(7), which discourages the development of multiple domestic water supply systems, "which will not serve the public generally,"…"where water supplies are available from water systems serving the public." Cascade Investment Properties, Inc., et al. v. DOE, PCHB Nos. 97-47 & 48 (1997).

The further decline in available water in a basin where instream flows established by rule are sometimes unmet would impair the public interest in maintaining viable fish habitat for anadromous and resident fish downstream of the withdrawal in violation of the public welfare protected under RCW 90.03.290. Cheney v. DOE, PCHB No. 96-186 (1997).

If an application satisfies the statutory criteria, there may be no compelling case to conclude as a matter of policy that the application should be denied on the basis of an available public water supply. The mere existence of a public water supply does not render a new appropriation a detriment to the public welfare under RCW 90.03.290. Port Blakely Tree Farms v. DOE, PCHB No. 96-65 (1997).

The further decline in available water resulting from the proposed withdrawals would impair the public interest in maintaining viable fish habitat for anadromous and resident fish in the immediate area and downstream of the withdrawal in violation of the public welfare protected under RCW 90.03.290. Lewis County Utility Corp. v. DOE, PCHB No. 96-043 (1997).

There is a substantial public interest in improving river flow and fish passage conditions for endangered species. Vanderhouwen v. DOE, PCHB Nos. 94-108, 94-146 & 94-231 (1997).

Where waters proposed for withdrawal or appropriation are above the instream flows set by regulation, denial is not automatic. Neither, however, is approval automatic. There still remains the issue, under the Water Code at RCW 90.03.290, of the "public interest." The public interest determination must be made in view of environmental, navigational and other values protected by the Water Resources Act of 1971. Center for Environmental Law & Policy v. DOE, PCHB No. 96-165 (1998).

In the case of a trust water right, if Ecology's action impairs the public interest by reducing base flows, the organization's interest falls within the zone of interests protected by chapter 90.42 RCW for purposes of standing. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Increasing or at least maintaining base flows advances the public interest. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

Ecology could condition a change application for an undeveloped surface water permit based upon the public interest. The instream flow conditions under the water quality certification would constitute reasonable requirements in granting any change of use of the 1907 water rights to protect the public interest under the Water Code. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Overriding Considerations to Public Interest

The Water Resources Act of 1971 ("WRA"), at RCW 90.54.020(3)(a), provides that "[w]ithdrawals of water which would conflict [with base flows] . . . shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." This overriding public interest provision is an exception to the statutory scheme establishing base flows. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

The first prong of the statutory exception in RCW 90.54.020(3), is the requirement that the proposed appropriation serve a public, as opposed to a private interest. The second prong requires that the public interest be so great as to override the harm to other public interests. This aspect of the exception invokes a balancing test. On the one hand are the public values protected by base flows. These are identified in RCW 90.58.020(3)(a) as: "preservation of wildlife, fish, scenic, aesthetic and other environmental and navigational values." The appropriator's use is weighed against that to see if it serves an overriding public interest. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

The requirement of showing an "overriding public interest," as opposed to any interest, means that the exception is to be narrowly construed. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

4. PERMIT CONDITIONS

Ecology cannot administratively enlarge the withdrawal rate in a permit after its issuance, where no appeal of the amount allowed was filed. Rylie v. DOE, PCHB No. 315 (1973).

Where reasonable water management so requires, the PCHB may specify the distance a permitee's point of diversion should be located above an existing user's diversion point. Reese v. DOE, PCHB No. 400 (1973).

The provision of RCW 90.54.020 calling for the maintenance of base flows in streams may be implemented by conditioning permits so as to require diversion to cease when flows are reduced to a specified level. Bogstad v. DOE, PCHB No. 539 (1975).

Groundwater permits may be conditioned so as to allow usage only during those times when the use will not constitute waste. Franz v. DOE, PCHB No. 558 (1975).

Requirements for casing, protective of upper aquifers and surface waters, [as a condition for permit] allows a deep well development to avoid impairment of existing rights. Gering & Sons v. DOE, PCHB No. 624 (1974); Heer v. DOE, PCHB No. 1135 (1977); Schell v. DOE, PCHB No. 77-118 (1978).

Where Ecology grants a permit based on expert prediction but an absence of hard facts, the permit should be conditioned in such a fashion that hard evidence may be procured at an early date for regulatory action to protect prior appropriators. Bar U. Ranch v. DOE, PCHB No. 77-63 (1977).

A permit condition which reduces the acre footage by "the amount of water available from rights of Columbia Basin Project" is a valid exercise of Ecology's authority to approve applications for a lesser amount of water than applied for. Schuh v. DOE, PCHB No. 77-109 (1977) aff'd Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

A permit condition may require that a known shallow aquifer be cased off where water from a high pressure deep aquifer is escaping up the well bore into the shallow aquifer. The loss of water and pressure from the lower aquifer violates RCW 90.44.110 which prohibits waste. Clerf v. DOE, PCHB No. 78-98 (1978).

Existing well owners are not entitled to a condition limiting withdrawals from a new well, absent a showing that operation of the new well will physically impair operation of the existing well. Johnson Creek Water Users v. DOE, PCHB No. 79-183 (1980).

Where area wells (including the well development appealed) do not appear to be directly interfering with one another and the evidence does not show that the appealed appropriation would cause other withdrawals to exceed a reasonable or feasible pumping lift, Ecology's permit decision may be affirmed. However, where complex hydrologic relationships are not fully understood and seasonal difficulties have been experienced in existing wells, detailed monitoring conditions are appropriate. Meyer & Ford v. DOE, PCHB No. 81-31 (1982).

Limitations on instantaneous withdrawal rate, hours of pumping and annual quantity may be imposed by Ecology to prevent impairment of existing rights in other wells. But, where data on aquifer suggests possibility of well interference, further studies of the effects of operation of the well in question may be required of the permitee. Endsley v. DOE, PCHB No. 81-107 (1982).

Concern for whether a permitee will carry out conditions of permit cannot be addressed in appeal of permit approval. These are matters for Ecology's enforcement authority. Frost Valley Farms v. DOE, PCHB No. 82-109 (1982).

Conditions on groundwater withdrawals from a saltwater island should be designed to prevent sea water intrusion, not to contend with it after the fact. Testing and monitoring provisions should be clearly adequate to prevent contamination and should not await the attainment of chloride concentrations which exceed accepted drinking water criteria. Wilbert v. DOE, PCHB No. 82-193 (1983).

Priority system and permit conditions regarding well construction and monitoring can avoid impairments of existing rights. Eacrett v. DOE, PCHB No. 84-257 (1985).

The ruling on an application to enlarge a reservoir holding more than ten acre feet at normal operating pool level is an appropriate occasion for the imposition of dam safety conditions. Rumball v. DOE, PCHB No. 86-127 (1987).

Where a permit seeks to authorize an established domestic system and evidence shows a history of neglect in operation, maintenance and upkeep of system, permit conditions which require a verifiable program of

inspection and maintenance are appropriate. Bryant v. DOE, PCHB No. 87-245 (1988).

A water right change application approval may be conditioned by reducing quantity in response to protest against impairment. Caton v. DOE, PCHB No. 90-42 (1991).

Ecology may not rely on regulation of a water right after it is issued to prevent impairment where the harm could be prevented through permit conditions. Caton v. DOE, PCHB No. 90-42 (1991).

Where there is no administrative regulation setting an instream flow, Ecology is authorized under RCW 90.54.020 to condition permits with minimum instream flows on a stream. Richert v. DOE, PCHB No. 90-158 (1991).

The purpose of the system of prior approval by permit is to prevent problems from arising, rather than dealing with them solely through after-the- fact enforcement. Richert v. DOE, PCHB No. 90-158 (1991).

Ecology is authorized to refuse or condition a water permit if issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream. Richert v. DOE, PCHB No. 90-158 (1991).

Ecology's regulation authorizes it to condition groundwater permits where hydraulic continuity is "significant" pursuant to WAC 173-549-060, where the individual or cumulative withdrawals would interfere with the maintenance of minimum instream flows. "Significant" is not defined in Ecology's regulations. Webster's Third New International Dictionary defines significant as: "(1) having meaning ... full of import: suggestive, expressive... (3a) having or likely to have influence or effect: deserving to be considered: important, weighty, notable..." Hubbard, et al. v. DOE, PCHB Nos. 93-73 & 103 (1995) *aff'd* Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Imposition of a development schedule on permitted water rights is a critical tool to ensure that limited water resources do not fall into a legal limbo where they are unavailable for appropriation but not put to beneficial use for years on end. Petersen v. DOE, PCHB No. 94-265 (1995).

The statutory proviso in RCW 90.44.100 gives Ecology clear authority to impose conditions on the issuance of an amendment consistent with the findings and recommendations set out in the Record Of Examination to prevent the enlargement of the existing right. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

After DOE issues a permit to appropriate water, the permitee must commence construction on any project within such reasonable time as shall be prescribed by Ecology, and prosecute the project with diligence and within the time allowed by Ecology. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

The time for construction of a project depends upon the size, expense, and complexity of the project. Ecology is required to consider the public welfare and the public interest when it fixes the time for construction of a project. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

A government agency does not act arbitrarily and capriciously by imposing a significant condition on the renewal of a permit if the condition is intended to correct an unlawful condition in the original permit. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Ecology may condition the extension of a water permit on the requirement that a certificate of vested water right will issue only to the extent that water has been put to an actual beneficial use even though the original permit allowed the permitee to obtain a certificate of vested water right based on the capacity of the permitee's water delivery system. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The basis on which to quantify a vested water right for purposes of issuing a water right certificate is a question of law. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

There is no legal authority for the proposition that a mitigation plan offered in support of a water right must provide replacement water of equal quantity, quality, timing, duration and location. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, -182, -183, -185, -186, & 98-019 (1999).

The mitigation plan does not protect existing rights and instream flows because it is too speculative and error-ridden to compensate for streamflow depletions likely to be caused by excavation of the mine pit. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

Daily meter readings are reasonable in order to protect the affected public interests in accordance with RCW 90.03.320 where there is a need for accurate data to ensure adequate flows are available in the river during certain months of the year is necessary for the proper management of the resource and for the protection of fish. Avalon Links v. DOE, PCHB No. 02-036 (2002).

Ecology may condition a permit extension beyond what was provided in the original permit and Report of Examination. The conditions of the original permit do not necessarily create a vested right to proceed under those conditions. Avalon Links v. DOE, PCHB No. 02-036 (2002).

V. INSTREAM FLOWS AND STREAM CLOSURES

In 1969, the Legislature enacted a statute authorizing the establishment of minimum flows and levels for streams and lakes by a rule-making process. Under RCW 90.22.010 the law provides for such flows or levels to be set

> For the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values ... whenever it appears to be in the public interest to establish same.

Additional explicit authority is provided to establish minimum flows or levels to preserve water quality. (WD).

The minimum flow setting process is also to be used to retain water in streams, lakes or other public waters for stockwatering on riparian grazing lands "where such retention shall not result in unconscionable waste of public waters." RCW 90.22.040.

Additional instream flow provisions were included in the Water Resources Act of 1971(WRA). Among the fundamentals of water use and management declared in RCW 90.54.020 is a statement that:

> Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition.

The primary means for implementing this fundamental policy is administrative rule-making, which finds its expression in chapter 173-500 WAC, et seq. (Instream Resources Protection Program).

After passage of the WRA, the Water Code was amended to clarify that Ecology is the only agency with the authority to set instream flows, and to describe the relationship of such flows to water rights acquired through the permit system. Permits are to be conditioned to protect the instream flows in effect as of the date of permit approval. RCW 90.03.247. The flows adopted are to "constitute appropriations ... with priority dates as of the effective dates for their establishment." RCW 90.03.345.

For a discussion of the differences between instream flows and traditional proprietary use rights, see Wenatchee-Chiwawa Irrigation District v. DOE, PCHB No. 85-215 (1986).

Appropriation of lake water for community domestic use in a housing subdivision, which would lower the lake level 3/8 inch at most, would not violate the requirement of RCW 90.54.020 that the lake be retained in substantially its natural condition. Lake Samish Community Assoc. v. DOE, PCHB No. 78-268 (1979).

Regulations which close streams to further consumptive appropriations are consistent with the Water Resources Act of 1971. Applications made prior to such rule-making, but not decided upon until afterwards may be denied on the basis of the regulations. Steele v. DOE, PCHB No. 79-20 (1979), Perrow v. DOE, PCHB No. 84-244 (1985).

Even where no instream flow has been established by regulation, a proposed appropriation may violate the base flow requirement of RCW 90.54.020(3). Coon v. DOE, PCHB No. 79-74 (1980).

Where instream flows have not otherwise been established, Ecology must condition its permit decisions to insure that enough water is left in perennial streams to comply with the intent of the law. The Report of Examination should articulate how the allocation principles of chapter 90.54 RCW have been evaluated and applied. Smith v. DOE, PCHB No. 81-34 (1981).

The requirement that perennial streams retain base flows necessary for fish and other environmental values is satisfied by a permit condition requiring diversion to cease when instream flow levels established by regulation are reached. The need for a finding of "overriding considerations of public interest" is necessary only for diversions which conflict with established instream flows. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

A minimum flow regime established by rule functions as an appropriation senior to all permits approved after the flows were established, even though such permits may have been applied for prior to the rule-making. The doctrine of relation back does not apply to exclude such later-approved permits from subservience to such flows. Williams v. DOE, PCHB No. 86-63 (1986).

Base flow limitations for the bypass reach of a hydroelectric project established pursuant to RCW 90.54.020(3) may be included in a state water quality certification issued under Section 401 of the Federal Clean Water Act. City of Tacoma v. DOE, PCHB No. 86-118 (1989).

The statutorily mandated use of base flows to enhance the natural environment refers to flow setting on streams degraded for fish habitat by prior appropriations. Setting base flows on such streams higher than actual flows experienced at present levels of usage might result in additional water for fish if some rights are abandoned or forfeited in the future. City of Tacoma v. DOE, PCHB No. 86-118 (1989).

Ecology may regulate groundwater withdrawal for the purpose of protecting a river's base flow. Richert v. DOE, PCHB No. 90-158 (1991).

All water rights must be subjected to the principle that the quality of the natural environment shall be protected. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental and navigational values. Likewise, lakes and ponds shall be retained in substantially their natural condition. Withdrawal of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. Stenback v. DOE, PCHB No. 93-144 (1994).

Water rights that pre-date the 1917 water code are not subject to base flows for fish and other instream uses. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994).

A rule creating minimum flows creates a water right for the public, even if the right is unsatisfied for a substantial portion of the year. Cedar River Water & Sewer District v. DOE, PCHB Nos. 96-59 & 96-60 (1996).

Where base flows are not being met, the water body must be treated in the same manner as streams subject to outright closure. No additional groundwater rights in hydraulic continuity may be granted without impairing the existing right to adequate instream flow. Sebero v. DOE, PCHB No. 96-126 (1997).

Minimum instream flows established by administrative rule create a water right inuring to the public. Cheney v. DOE, PCHB No. 96-186 (1997); Strobel v. DOE, PCHB No. 96-52 (1997); Chandler v. DOE, PCHB No. 96-35 (1997).

Where there are inadequate flows to fill the public's instream flow rights, a proposed diversion of surface water, even though relatively small in quantity, would constitute a further impairment of the public's existing rights and further diminish the instream values that the minimum flow reservations were designed to protect, contrary to RCW 90.03.290. Chandler v. DOE, PCHB No. 96-35 (1997).

Under RCW 90.03.345, a minimum instream flow established by rule promulgated pursuant to RCW 90.22.010 and RCW 90.54.040 is an appropriation of surface water with a priority date as of the effective date of its establishment. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Once a minimum instream flow has been established for a river or stream, any permit issued for withdrawals of groundwater from a groundwater source that has a 'significant hydraulic continuity' with the river or stream may be restricted in a way that protects the minimum instream flow. Any effect on the river or stream during the period it is below the minimum instream flow level constitutes a conflict with the existing senior right of the minimum instream flow and may reasonably be considered detrimental to the public interest. Hubbard v. DOE, 86 Wn. App. 119, 936 P.2d 27 (1997).

Ecology may impose instream flow requirements in a water quality certification if they are reasonably calculated to protect the existing fisheries habitat within a bypass reach. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Instream flow requirements in a water quality certification must be reasonably calculated to protect the existing fisheries habitat within a bypass reach. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

A minimum instream flow of surface water as established by law constitutes an appropriation that may not be impaired by a subsequent withdrawal of groundwater that is in hydraulic continuity with such surface water. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

The Legislature has distinguished between minimum instream flows under chapters 90.03, 90.22, and 90.54 RCW, and instream flow conditions in a Section 401 certification under the Clean Water Act and the Water Pollution Control Act, chapter 90.48 RCW. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

A private water right to maintain instream flow is not recognized under Washington law. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

Instream flows are recognized as beneficial uses, but the right to establish instream flows rests exclusively with DOE. Airport Communities

Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

When an instream flow is created, it is a right held by the state and not by an individual permitee. Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

An applicant can obtain a right to a certain flow in surface water to support fish propagation research. Bevan v. DOE, PCHB No. 48 (1972); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

A surface water right to support fish propagation research is not the establishment of a minimum flow by private action. Bevan v. DOE, PCHB No. 48 (1972); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

VI. TRUST WATER RIGHTS

The public interest advanced by the Trust Water Program is "to facilitate the voluntary transfer of water and water rights, including conserved water, to provide water for unmet needs and emerging needs." First among the unmet needs identified by the Legislature is "the water required to increase the frequency of occurrence of base or minimum flow levels in streams of the state." Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

RCW 90.42, which creates the trust water rights program, is based on the Legislature's finding that "the State of Washington is faced with a shortage of water with which to meet existing and future needs." The Legislature named increasing minimum or base flows first in identifying those existing and future needs. The trust water rights program, moreover, mandates that a trust water right may only be authorized if Ecology first finds that the neither the public interest nor an existing water right will be impaired. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

In the case of a trust water right, if Ecology's action impairs the public interest by reducing base flows, the organization's interest falls within the zone of interests protected by chapter 90.42 RCW for purposes of standing. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

While the Trust Water Program guidelines themselves are not enforceable, the Act's mandate that Ecology must find no impairment to the public

interest before creating a trust water right is enforceable. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1998).

The Legislature created the trust water rights program to satisfy "a need…to develop and test a means to facilitate the voluntary transfer of water and water rights, including conserved water, to provide water for presently unmet needs and emerging needs." RCW 90.42.010; Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

Mere breach of Ecology's published Guidelines for the Trust Water Rights Program does not necessarily violate the public interest and the Water Resources Management Act. The burden is greater: Appellant has to show that a violation of the guidelines impairs the multifold public interests that the Trust Water Rights Program seeks to advance. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

By reviewing past studies and other records and estimating the amount of acreage that had historically been irrigated in a given region, Ecology followed the guidelines set out in Ecology's published Guidelines for the Trust Water Rights Program as elements necessary to determine the water savings potentially available for trust designation, and did not impair the public interest. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

While the Trust Water Right Program guidelines themselves are not enforceable, the Water Resources Management Act's mandate that Ecology must find no impairment to the public interest or to existing water rights before exercising a trust water right is enforceable. RCW 90.42.040(4); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

Ecology's definition of "reasonably efficient practices" in its published Guidelines for the Trust Water Rights Program, and its use of a reasonable efficiency rate of 55 percent in a particular region was consistent with Grimes: The test for reasonable efficiency calls for consideration of what is the customary, established means of improving the irrigation system. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

The Water Resources Management Act, chapter 90.42 RCW, established the trust water rights program. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

While the Legislature plainly decided that a cooperative process designed to resolve water management conflicts must be flexible, and therefore put few legal requirements for the trust program in the Water Resources Management Act, the Act does require that Ecology establish guidelines to govern the acquisition, administration and management of trust water rights. RCW 90.42.050; Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

Nothing in Ecology's published Guidelines for Trust Water Rights Program or chapter 90.42 RCW compel Ecology to assess return flows in creating temporary trust water rights. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

In creating the trust water program, the Legislature recognized that the "State of Washington is faced with a shortage of water with which to meet existing and future needs…" The Legislature named increasing minimum or base flows and satisfying existing water rights among those existing and future needs. RCW 90.42.005(2)(a) & (b); Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

The guidelines which Ecology must establish to govern the acquisition, administration and management of trust water right must address several broad topics, including '[m]ethods for determining the net water savings …and other factors to be considered in determining the quantity or value of water available for potential designation as a trust water right…" RCW 90.42.050; Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

In distinguishing between irrigation water that had been beneficially used and that which had been wasted, and deducting the latter from the calculation of waters available for transfer into the trust, Ecology followed the letter of its published Guidelines for Trust Water Rights Program which required that only water that had been beneficially used using reasonably efficient practices could be transferred into the trust. Okanogan Wilderness League v. DOE & Dungeness River Water Assoc., PCHB No. 98-84 (1999).

DOE lacks authority to require a water right holder to use its water right to irrigate its lands." Thurlow v. DOE; PCHB 00-189 (2001).

VII. WATER TRANSFERS

A. CHANGE OF USE

1. GENERAL

Prior to amendment (change of location or purpose) of a groundwater permit or certificate, RCW 90.44.100 requires findings "as prescribed in the case of an original application." This makes the "public welfare" criterion of RCW 90.03.290 relevant. Sparks v. DOE, PCHB No. 77-43 (1977).

Application for a change of use must be sufficiently detailed to allow Ecology to make the same findings as for an original application. An application to change a permit for municipal use to a use described only by the broad and vague term "non-municipal" was properly rejected as inadequate. University Place Water Co. v. DOE, PCHB No. 80-60 (1980).

Normally, additional time can be given to complete or correct a permit application, including an application for change of use. However, where data needed is still not presented at hearing some five months after Ecology rejected the application, granting additional time is inappropriate. A new application can always be filed. University Place Water Co. v. DOE, PCHB No. 80-60 (1980).

That a right originated prior to passage of the Water Code of 1917 does not exempt a post-1917 change of point of diversion and place of use from Ecology approval under RCW 90.03.380. Pearson and Squilchuck-Miller Water Users Association v. DOE, PCHB No. 85-110 (1987).

The requirement of RCW 90.03.380 that a change of point of diversion and place of use be made "without detriment or injury to existing rights," does not invoke the rule of priority. Even the right of a senior appropriator to change his point of diversion depends on whether such change will be detrimental to the rights of junior appropriators in existence at the time the change is proposed. Pearson and Squilchuck-Miller Water Users Association v. DOE, PCHB No. 85-110 (1987).

Temporary changes of point of diversion and place of use may be granted pursuant to RCW 90.03.390 when they can be made without detriment to existing rights. Where right holders both above and below the proposed diversion are experiencing difficulty in meeting their needs, such a change cannot be permitted. Jellison v. DOE, PCHB No. 88-124 (1989).

Where water is not sufficient at the original diversion point and place of use to satisfy a right, a temporary change of the entire right to a new

diversion point and place of use cannot be allowed. The scope of a right is no greater than the amount which is exercisable at the original situs. A transfer cannot enlarge the right. Jellison v. DOE, PCHB No. 88-124 (1989).

The Legislature did not intend for a right to be moved to a new location where a right could not have been created originally. Thus, such transfers must conform with the criteria for granting new rights, including the public interest standard. Graves v. DOE, PCHB No. 88-140 (1989).

An examination by Ecology of available water concluding that there is currently no more water available for new appropriation should not be a barrier to an application to change the place of use of an existing water right. Pariseau v. DOE, PCHB No. 92-142 (1993).

In reaching a conclusion regarding the validity of a water right claim for transfer under RCW 90.03.380 it is not necessary to have evidence of the precise date at which water was put to beneficial use. Rather, it is reasonable to conclude that the water right was perfected if, in considering all the evidence available, it is more probable than not that the right was perfected by 1917 or a reasonable time thereafter. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

The fact that the water has been over appropriated is not in and of itself relevant to the extent that existing valid rights are at issue. It may well be true that any continued use of water is detrimental to the instream flows necessary sustain dwindling stocks of salmon, but that fact does not figure into the determination of whether an existing right may be changed without adversely impacting other existing rights under RCW 90.03.380. The issue is whether the specific transfer and, in this case, consolidation of rights, will have an increased impact on the river. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

A long abandoned right may not be deemed valid and subject to a transfer under RCW 90.03.380. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995), aff'd R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

The determination of validity required under RCW 90.03.380 is tentative only with respect to rights based on a claim arising before the 1917 Water Code. To find that the claim is valid there must be evidence of a claim predating the effective date of the Water Code in 1917 and evidence of beneficial use before the effective date of the Water Code or the exercise of due diligence thereafter to put the claimed water to beneficial use. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995).

To approve a water right change the PCHB must find that three criteria have been satisfied: (1) that the applicant holds valid water rights; (2) that the proposed change will be for a beneficial use; and, (3) that the change will not result in any adverse impact on existing rights. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995), aff'd R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Impairment does not arise where the effect of the changed right upon other rights is the same as the original right. Andrews v. DOE, PCHB No. 97-20 (1997).

The meaning of RCW 90.44.100 is that a change to a water right must not impair either senior or junior rights. Andrews v. DOE, PCHB No. 97-20 (1997).

A temporary change should not be approved in a doubtful case. Andrews v. DOE, PCHB No. 97-20 (1997).

Where incomplete information exists to determine whether the existing rights of others would be impaired, a change cannot be granted. Andrews v. DOE, PCHB No. 97-20 (1997).

Where Ecology is vested with the discretion to grant or deny a change application, it is vested with the authority to impose reasonable conditions. The imposition of conditions does not transform a certificated water right to a preliminary permit to develop a new water right. Absent relinquishment, if the conditions of the change order are not satisfied, the water right reverts to its status prior to the application for a change. In contrast, a preliminary permit issued under RCW 90.03.290 would expire and there would be no remaining right to use or develop waters of the state. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

Under RCW 90.03.380, whether a change may be made in the point of diversion or use made of a previously perfected water right, or whether the right may be transferred to another, depends upon whether, and to what extent, the right has been abandoned or relinquished and whether the sought-after change or transfer would be detrimental or injurious to existing rights; it does not depend upon the historic perfected use made of the right or the amount of the right actually put to a beneficial use immediately prior to the time the request for the change was made. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

When Ecology is asked, under RCW 90.03.380, to approve a requested change in the point of diversion or use made of a previously perfected water right, or to approve a transfer of the right to another, it must

tentatively determine the extent to which the right continues to be applied to a beneficial use; i.e., Ecology must preliminarily quantify the right and determine if the right has been abandoned or relinquished in whole or in part. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

An undeveloped, inchoate surface water right may not be considered for a change. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000), followed in Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Ecology could condition a change application for a surface water permit based upon the public interest. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000), rejected by Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Appellants' assertion that harm is created by the loss of farmland and inability to convert the farmland to other uses that are more beneficial use is not within the zone of interests protected by the Water Code, absent an allegation the water will not be applied to a beneficial use, as defined in RCW 90.54.020(1). Ironworkers Local 29 v. DOE, PCHB No. 01-007 (2001).

A change approval by its very nature does not allow new withdrawals to occur. As such, no evidence has been submitted that would establish that the aesthetic, recreational or aquatic habitat will be harmed as a result of Ecology's approval. Ironworkers Local 29 v. DOE, PCHB No. 01-007 (2001).

Looking beyond the language appearing on the face of a water right certificate to other documents issued by Ecology in processing the water right change is appropriate. Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983); Kison v. DOE, PCHB No. 01-044 (2001).

The fact that the same express language on total acreage found in the Report of Examination was not contained in the water right permit or certificate is not controlling. Kison v. DOE, PCHB No. 01-044 (2001).

DOE has authority to tentatively determine whether a water right has been abandoned or relinquished when acting on an application for a change in point of diversion under RCW 90.03.380, and the PCHB may also do so when reviewing action on a change application. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

DOE does not have authority to consider the public interest when deciding whether to grant an application for a change in point of

diversion of water under RCW 90.03.380. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Water right changes should be issued to clearly record the right and priority of water when necessary to implement a mitigation plan. Okanogan Highlands Alliance v. DOE, PCHB No. 97-146 (1998); Airport Communities Coalition v. DOE, PCHB NO. 01-160 (2002) (Findings Of Fact, Conclusions Of Law, And Order).

The amount of water available for transfer in a water right change is properly based on the historic use under the water right if alternative plans are begun within the five-year relinquishment period under the determined future development exception from relinquishment. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002).

In quantifying a water right for transfer, the right is properly defined by the amount of water diverted and put to beneficial use without discount for return flows where discharge was at the mouth of an estuary which did not create a return flow available to other water right users. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002).

The annual quantity available for transfer under a water right is the highest annual use in a five-year period of lowest use. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002).

RCW 90.03.380 presumes that water has actually been put to beneficial use, thus permitting changes in point of diversion if, and to the extent that, the water has been beneficially used. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

In taking action under RCW 90.03.380, DOE must make a tentative determination of the validity and extent of the water right proposed for change, including whether all or a portion of the asserted water right has been relinquished or abandoned. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002); Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

2. PLACE OF USE

The common law and statutory rule (RCW 90.03.380) is that rights to use water are appurtenant to land. A change of location cannot enlarge the right initially acquired. Thus what was a supplemental right at the original location cannot become a primary right at a new location by virtue of the move. (WD).

Transfer of an undeveloped groundwater withdrawal to a location 25 miles distant within the Quincy subarea would set a precedent detrimental to the public welfare by subverting the management scheme under which pending applications have been held in abeyance. Sparks v. DOE, PCHB No. 77-43 (1977); Schuh v. DOE, PCHB No. 77-109 (1977) aff'd Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

By regulation, the transfer of a permit to use artificially stored groundwater (QB permit) to a new location must be approved by Ecology. If RCW 43.27A.090 is assumed to be the statutory source of criteria for such a transfer, the public interest standard is found in the authority to adopt policies "necessary to insure that the waters of the state are used, conserved and preserved for the best interests of the state." Archambeau v. DOE, PCHB No. 77-114 (1978).

An appropriation right for irrigation is appurtenant to the land on which it is used. RCW 90.03.380. When such a right is transferred to new lands at a different location, no right to irrigate the original situs remains. Benningfield v. DOE, PCHB No. 87-106 (1987).

An application for a change of place of use of a groundwater certificate is governed by RCW 90.44.100, which states in relevant part the construction of an additional well or wells shall not enlarge the right conveyed in the original permit or certificate. This language has been interpreted by the State Supreme Court to forbid a change to a permit which would increase the acreage of the original permit. Danielson v. DOE, PCHB No. 93-318 (1994).

3. PURPOSE OF USE

At common law, an appropriator is not limited to the use for which the appropriation was initially made. Since 1917, however, changes in the purpose of use have required approval by the state. A change made without obtaining such approval is not valid. DOE v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985).

Approval of an application for change is a discretionary act just as is the initial issuance of a permit. DOEv. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1983).

Under RCW 90.03.380, a prior perfected water right for a seasonal use of water may be changed to year-round use if the change is not detrimental or injurious to existing rights. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

4. POINT OF DIVERSION/WITHDRAWAL

Ecology was equitably estopped from denying an application for change of point of withdrawal of artificially stored groundwater filed upon Ecology's instructions in order to cure an error made by Ecology in losing the original application. Lauzier v. DOE, PCHB No. 952 (1976).

Under RCW 90.44.100, a well at a new location, constructed in substitution for old wells covered by certificated rights, must tap the same body of public groundwater as the original wells. Shinn v. DOE, PCHB No. 1117 (1977).

Although RCW` 90.03.380 is relevant to a change of point of withdrawal and place of use of groundwater, such changes are not limited to situations where water has already been applied to a beneficial use at the original location. Changes may be made at the permit stage, even though water has not yet been appropriated. The statute restricts changes in location to those cases in which use at the new site can occur "without injury or detriment to existing rights." Sparks v. DOE, PCHB No. 77-43 (1977).

Application for change of place of diversion for a claimed vested right requires assessment of validity of right sought to be changed. Conclusion that right either never came into existence or has been abandoned can serve as basis for denial of application. Huegenin v. DOE, PCHB No. 79-77 (1980).

Groundwater rights cannot be moved to a new location unless "other existing rights will not be impaired." Among the existing rights to be considered are the rights of those with pending permit applications to a place in line for the allocation of available water. Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

In order to change the location of a right without harming other existing rights, the amount of water under the right moved may have to be reduced from its original quantity. Pearson and Squilchuck-Miller Water Users Association v. DOE, PCHB No. 85-110 (1987).

Where the pumping of a new municipal well under a prior right transferred from another location had the effect of lowering water in existing private domestic wells, existing rights were not impaired because the draw down was not beyond a reasonable or feasible pumping lift. Graves v. DOE, PCHB No. 88-140 (1989).

The diversion point of a water right may not be changed under RCW 90.03.380 if the right has been abandoned or otherwise extinguished.

Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

In deciding whether to grant a request to change the diversion point of a water right, Ecology may tentatively determine the existence and quantity of the water right. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

The diversion point of a water right may be changed under RCW 90.03.380 only if the water right has historically been applied to a beneficial use. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

A change in point of diversion which would affect other rights no differently than if the diversion were made in the certificated amount at the original point of diversion is not impairment. Kile v. DOE, PCHB No. 96-131 (1997).

Ecology properly denied a request for a temporary change for the establishment of an additional well where insufficient information existed to show that operation of the right with two wells spaced significantly apart would have the same effect upon the rights of others as operation of the right with one well only. Andrews v. DOE, PCHB No. 97-20 (1997).

The proper method for documenting a change in point of diversion for a water right is to file an application with Ecology. Anderville Farms, Inc. v. DOE, PCHB No. 00-62 (2000).

B. TRANSFER OF OWNERSHIP

1. TRANSFER OF REAL PROPERTY INTEREST

A perfected water right is appurtenant to the land on which it is used. Initially the right belongs to the person in whose name the Certificate of right is issued, who may or may not be the owner of the land. The ownership of the water right may be transferred or retained separately from the land to which it is connected. When the ownership of the land and the right are different, transfer of the land conveys no interest in the water right. However, when the ownership of the land and the right are the same, the water right passes with a conveyance of the land, unless specifically reserved by the grantor. Foster v. Sunnyside Irrigation District, 102 Wn.2d 395, 687 P.2d 841 (1984).

A farmer who has acquired a right to irrigate 80 acres has 80 acres worth of water, variable in quantity depending on the requirements of the crop being grown. Should the farmer switch from a water-intensive crop to

one requiring less water, he would not have any right to the no-longer required amount previously used. He would have no such "surplus" to sell. Benningfield v. DOE, PCHB No. 87-106 (1987).

Very often both the real estate and the water right permit for the real estate are conveyed by the same documents. Ecology must necessarily examine the real property transfer documents to ascertain if those documents also show that the water right permit passed with the real property. If the documents sufficiently indicate that the water right permit or application was conveyed along with the property, Ecology will accept the assignment and treat it as valid and binding so that Ecology will direct its future communication to the assignee. Moore v. DOE, PCHB No. 96-158 (1996).

2. ASSIGNMENTS OF APPLICATION, PERMIT OR CERTIFICATE

A groundwater right embodied in a certificate may be validly assigned, but ultimately such assignment is subject to the conditions of the original permit. One may not assign a right greater than he holds. Schuh v. DOE, PCHB No. 77-109 (1977) aff'd Schuh v. DOE, 100 Wn.2d 180, 667 P.2d 64 (1983).

Because the owner of water rights on a tract may be different from the owner in fee of the realty, Ecology is under no obligation to discover and notify the fee owner when a portion of the water rights are assigned to another for use on other property. Benningfield v. DOE, PCHB No. 87-106 (1987).

Under RCW 90.03.310, the assignment of a permit application is not valid unless filed for record with and consented to by Ecology. A separate assignment is needed because a permit application is personal property and not part of the associated realty. When Ecology learns that realty has been transferred, it does not thereby acquire notice that any water rights application has been transferred. Stout v. DOE, PCHB No. 89-99 (1990).

Ecology is not empowered to construe the validity of an assignment of the water permit, where it is challenged-- that is the province of the courts. But to ensure that its records accurately reflect the holders of water rights permits and applications, and effect the Legislature's purpose in passing RCW 90.03.310, Ecology must make a threshold decision, where the assignor does not file an assignment, as to whether or not the real estate transfer documents appear to convey the water right permit or application as well. Moore v. DOE, PCHB No. 96-158 (1996).

Ecology's decision to accept the assignment for filing gives this Board jurisdiction over this matter pursuant to RCW 43.21B.110. Moore v. DOE, PCHB No. 96-158 (1996).

The purpose of RCW 90.03.310 (assignment) is record-keeping. The statute assists Ecology in tracking the owners of water rights permits and applications by requiring assignees of a water right permit or application to notify Ecology before the assignment can be considered valid and binding. Moore v. DOE, PCHB No. 96-158 (1996).

Ecology's acceptance of an assignment is only for the record-keeping purposes of RCW 90.03.310. Ecology's acceptance of an assignment does not mean that it is valid for other purposes: a party could successfully show in court, for example, that the assignment was procured by fraud. Moore v. DOE, PCHB No. 96-158 (1996).

VIII. REGULATION/ENFORCEMENT

A. AGENCY RESPONSIBILITIES/ AUTHORITY TO REGULATE

Ecology need not consider RCW 90.44.130 in its initial determinations as to whether a permit should be issued. The provision deals with regulation and applies to persons who have already perfected rights to a well constructed pursuant to a permit. Andrews and Peterson v. DOE, PCHB No. 77-4 (1977).

Where permits for artificially stored water limit well depth, an order calling for backfilling of wells drilled deeper than the limit is valid. The permit may be cancelled if the backfilling is not accomplished within an agreed upon reasonable time. Dept. of Natural Resources v. DOE, PCHB No. 1055 (1978).

Well casing requirements may be imposed by regulatory order. An order issued pursuant to RCW 43.27A.190 must set forth "the facts upon which the conclusion of violating or potential violation is based." Schell v. DOE, PCHB No. 77-118 (1978).

RCW 90.22.040 does not provide an independent basis for regulating irrigation in favor of downstream stockwatering where the minimum flow setting procedures of the statute have not been implemented. Riddle v. DOE, PCHB No. 77-133 (1978).

Ordinarily, Ecology has discretion to determine the date by which head boxes and measuring devices must be installed pursuant to RCW 90.03.360. Savaria v. DOE, PCHB No. 78-53 (1979).

Ecology's tentative determination of the extent of vested rights may serve as the basis for regulation, notwithstanding that no general adjudication of rights in the area has been held. Mackenzie v. DOE, PCHB No. 77-70 (1979).

Where general adjudications have not occurred, Ecology must attempt to decipher the status of rights, in carrying out its responsibilities under RCW 43.21.130 to "regulate and control the diversion of water in accordance with the rights thereto." The PCHB must decide the merits of such determinations when regulatory orders are appealed to it. Riddle v. DOE, PCHB No. 77-133 (1978); Huegenin v. DOE & Bell, PCHB No. 79-74 (1980).

The issuance of a permit to a new water purveyor for a residential subdivision already served from another source is not necessarily contrary to the public interest. Relevant considerations are whether water is physically available at the new locale and can be withdrawn without interference with prior rights, whether the total amount of water used will be increased, and whether users of the new system will relinquish their interest in the old one. Sisson v. DOE, PCHB No. 82-25 (1982); Vehrs v. DOE, PCHB No. 82-36 (1982).

Ecology may regulate groundwater withdrawal for the purpose of keeping a river's base flow intact. Richert v. DOE, PCHB No. 90-158 (1991).

If the terms or conditions of a permit are violated, or if it appears that the water production of another well is adversely affecting a party's use of their water right, a party damaged thereby has the right to lodge a complaint with Ecology, which then has a duty to investigate and take whatever action is appropriate under law. Hall v. DOE, PCHB No. 92-32 (1992).

Ecology is prohibited from granting a variance that would abrogate a substantive provision of the laws of the State of Washington. The granting of a variance that would allow interaquifer transfer or the impairment of water quality would be an abrogation of a substantive provision of the laws of the State of Washington. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

An administrative agency's authority to act is limited to that which it is authorized to do by the Legislature. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

The PCHB, in determining the reasonableness of a penalty, may consider the nature of the violation, the previous history of the appellant, and the actions of the appellant since the violation to correct the problem. Fletcher v. DOE, PCHB No. 94-178 (1995).

Ecology's adoption of chapter 173-509 WAC constituted a determination that further appropriations of groundwater in hydraulic continuity with tributaries to the Green River would impair existing rights and instream values protected by statute. Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

Ecology is authorized to impose a civil penalty of up to $100 per day, per violation of the Water Code, Ecology's implementing regulations, and regulatory orders. Vanderhouwen v. DOE, PCHB Nos. 94-108, 94-146 & 94-231 (1997).

RCW 43.27A.190(2) authorizes Ecology to issue a regulatory order against any person violating RCW 90.44. RCW 43.27A.190(7) empowers Ecology to issue cease and desist orders, and, in the appropriate circumstances corrective action to be taken within a specific and reasonable time. WAC 508-64-010 authorizes Ecology to require that those withdrawing the state's waters, place measuring devices on their facilities to "provide accurate measurement of waters so utilized." Vanderhouwen v. DOE, PCHB Nos. 94-108, 94-146 & 94-231 (1997).

Regulation both between senior and junior appropriators and between the public interest in instream flows and appropriators can be a tool to prevent an attenuated risk of impairment. Chandler v. DOE, PCHB No. 96-35 (1997).

Chapter 90.03 RCW does not contemplate permitting all requested uses and then requiring Ecology to regulate them on the basis of priority to prevent junior rights from impairing senior ones. The permitting system is designed to head off regulatory problems inevitable if new rights are granted that must be interrupted to service senior ones. Chandler v. DOE, PCHB No. 96-35 (1997).

A statutory right can be enforced by an agency only up to the funding provided to the agency by the Legislature. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

The Legislature's creation of a program does not bind the Legislature to appropriate funds for that program. A court will not require the Legislature to provide funding for a program unless the provision of funding is constitutionally mandated. Hillis v. DOE, 131 Wn.2d 373, 932 P.2d 139 (1997).

Inasmuch as Ecology does not exercise adjudicative powers, it is not prevented from taking a different position, making a different argument, or drawing a different conclusion in subsequent proceedings in the same case. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

Ecology is prohibited by law from conducting administrative adjudications under the Administrative Procedures Act, chapter 34.05 RCW. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

The appearance of fairness doctrine does not apply to issuance of a decision by Ecology on a water right change application or a water quality certification. The doctrine only applies in the context of a quasi-judicial proceeding. To the extent the Applicant alleges that employees of Ecology were biased, that consideration is relevant only to the particular weight the PCHB should give to the testimony of a witness. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

The state's waters are held in trust by the state and any disposition of water rights occurs in the state's capacity as a trustee for the benefit of the public. Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

DOE is the agency that holds the exclusive authority to appropriate water rights and to establish minimum water flows in streams or lakes. Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

Any acts of DOE in managing state waters dedicated for the public use is in its capacity as trustee. Muckleshoot Indian Tribe v. DOE, ___ Wash. App. 2d ___, 50 P.3d 668 (2002).

DOE lacks authority to require a water right holder to use its water right to irrigate its lands." Thurlow v. DOE, PCHB No. 00-189 (2001).

B. AGENCY ENFORCEMENT

After the posting of a headgate by Ecology, readjustment of the flow and padlocking of the headgate by appellant was a violation of water code. However, because the readjustment was not in bad faith but believed to be in correction of actions of vandals, a civil penalty was suspended on condition of non-violation for two years. Nesland v. DOE, PCHB No. 79-167 (1980).

In enforcing the requirement of 90.58 RCW that lakes and ponds shall be retained substantially in their natural condition, Ecology must provide adequate data to show the water level which represents the natural condition. Oyster Bay Associates v. DOE, PCHB No. 84-171 (1984).

Under RCW 43.27A.190, a regulatory order demanding corrective action must specify the provision of the statute alleged to be or about to be violated. Brownell v. DOE and Williams, PCHB No. 85-135 (1985).

Where Ecology fails to show either a present violation of law or the imminent threat of one, a regulatory order must be reversed. Brownell v. DOE and Williams, PCHB No. 85-135 (1985). See also Paradis v. DOE, PCHB No. 85-182 (1986).

After "posting" of diversion works, disregard of the order set forth is an independent violation of the water code. The recourse of the water user is through the appeals process provided by law. Williams v. DOE, PCHB No. 86-63 (1986); Hole v. DOE, PCHB No. 86-231 (1987).

Withdrawal and use of groundwater without a permit over an area greater than 1/2 acre may be the subject of a cease and desist order. The existence of a pending application in an area where water is in short supply and many other applications earlier in time are on file, provides no basis for overturning the order. Morris v. DOE, PCHB No. 87-173 (1987).

The posting of a Notice of State Regulation on diversion works functions is an appealable order to cease and desist diversions. The transitory nature of water, the complexity of the priority system and the variability of demand, have traditionally been viewed as presenting emergent circumstances, placing water resources enforcement in a category akin to health and safety codes, requiring immediate action prior to hearing. W-I Forestry Products v. DOE, PCHB No. 87-218 (1988).

Where a streambed carries both natural flows and releases from storage, effective reservoir outlet controls and a measuring device can be required of users of stored waters in order to allocate adjudicated waters properly downstream. Noncompliance may be remedied by an order obliging

stored water users to cease diversions from the stream. However, the state has an obligation of reasonableness in the timing of its enforcement actions and should provide guidance in such matters by setting forth a compliance schedule which includes a plan review step prior to construction. Davis v. DOE, PCHB No. 88-94 (1989).

In enforcing instream flow regulations, Ecology is not limited to after-the-fact orders to cease and desist, issued without prior warning. The establishment of a River Flow Information Line with notice to diverters to call in for up-to-date flow data and with instructions to cease diversions when flows were below the adopted minimums represents a lawful and reasonable effort to assist farmers and promote voluntary compliance by providing advance information. Geestman v. DOE, PCHB No. 89-101 (1989).

C. EQUITABLE ESTOPPEL

Ecology was equitably estopped from denying an application for change of point of withdrawal of artificially stored groundwater filed upon Ecology's instructions in order to cure an error made by Ecology in losing the original application. Lauzier v. DOE, PCHB No. 952 (1976).

Equitable estoppel against the state acting in its governmental capacity is not favored. Even if all the required elements were met, it is still not to be applied where it would interfere with the state's exercise of its governmental function. Caton v. DOE, PCHB No. 90-42 (1991).

If an Ecology employee had assured appellants that a permit would be granted, his action would have been ultra vires as Ecology is not authorized to issue water right permits into a declining aquifer. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

The burden of proving each of the elements is on the party seeking to invoke the doctrine of equitable estoppel. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

The elements of equitable estoppel are: (1) an admission, statement, or act, inconsistent with a claim afterwards asserted; (2) action by another in reasonable reliance upon that act, statement, or admission; and (3) injury which would result to the relying party if the first party were allowed to contradict or repudiate the prior act, statement, or admission. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Because equitable estoppel against the government is disfavored, each of the elements must be established by clear, cogent and convincing evidence. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Using equitable estoppel to prevent Ecology from evaluating a permit under the controlling statutory provisions would impair the exercise of important governmental powers. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

When a party seeks to assert equitable estoppel against the state, that party must additionally show: (1) that equitable estoppel is necessary to prevent a manifest injustice; and (2) that the exercise of governmental powers will not thereby be impaired. Smasne Farms, Inc. v. DOE, PCHB No. 94-114 (1994).

Clear, cogent and convincing evidence of reliance on information from Ecology in failing to file a claim during his ownership is required to estop Ecology from citing the claim filing requirements of chapter 90.14 RCW. Deatherage v. DOE, PCHB No. 93-264 (1994).

Application of estoppel to a water right decision would impair Ecology's exercise of its governmental function to administer the water code because it would prevent Ecology from meeting its duty to protect senior water rights, which include instream flows. Wells v. DOE, PCHB No. 96-82 (1997).

Equitable estoppel against the government is disfavored. Wells v. DOE, PCHB No. 96-82 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999); Avalon Links v. DOE, PCHB No. 02-036 (2002).

To prove equitable estoppel, a party must prove by clear and convincing evidence: (1) a party's admission, statement, or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Wells v. DOE, PCHB No. 96-82 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Avalon Links v. DOE, PCHB No. 02-036 (2002).

When a party asserts the doctrine against the state, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the application of estoppel. Wells v. DOE, PCHB No. 96-82 (1997); DOE v. Theodoratus, 135 Wn.2d 582, 957

P.2d 1241 (1998) ; Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999); Avalon Links v. DOE, PCHB No. 02-036 (2002).

The doctrine of equitable estoppel may not be applied if the representation allegedly relied upon is a matter of law rather than fact. DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998); Avalon Links v. DOE, PCHB No. 02-036 (2002).

Ecology is not barred from initiating relinquishment under the doctrine of equitable estoppel. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

The doctrine of equitable estoppel does not apply where the meaning of a statutory provision is at issue. DOE v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002).

Some ambiguity in a state's order is not grounds for application of equitable estoppel. Avalon Links v. DOE, PCHB No. 02-036 (2002).

D. METERING

Given the possibility that the more water could be withdrawn under a water right than permitted in the superseding certificate, RCW 90.44.100 gives Ecology the clear authority to require installation of metering devices. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Ecology's imposition of metering does not impair in any way appellants' water rights. Impairment must be "a substantial as distinguished from a mere technical or abstract damage" Hutchins, Water Rights Laws in the Nineteen Western States, Vol. II, at 193 (1974), and does not preclude reasonable regulation of a right. Gonzales, et. al. v. DOE, PCHB Nos. 96-44 and 96-134 (1996).

Daily meter readings are reasonable in order to protect the affected public interests in accordance with RCW 90.03.320 where there is a need for accurate data to ensure adequate flows are available in the river during certain months of the year is necessary for the proper management of the resource and for the protection of fish. Avalon Links v. DOE, PCHB No. 02-036 (2002).

E. PUBLIC TRUST DOCTRINE

The public trust doctrine imposes obligations on the state with regard to the protection of the public's access to navigable waters and shorelands. Ecology does not have statutory authority to assume the state's public trust duties. Rettkowski v. DOE, 122 Wn.2d 219, 858 P.2d 232 (1993).

Ecology does not have statutory authority to assume the state's public trust duties. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

The public trust doctrine does not serve as an independent source of authority for deciding a water rights dispute; nor is the doctrine necessarily applicable as a canon of construction for interpreting provisions of the state Water Code. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Any authority Ecology has under the Public Trust Doctrine, as it relates to water quality, is defined by the federal and state Clean Water Acts. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Ecology has no affirmative duty under the Public Trust Doctrine; rather the only guidance available as to how the Public Trust Doctrine should be applied is found in the Water Code. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Inasmuch as Ecology does not have statutory authority to assume the public trust duties of the state, the public trust doctrine does not provide an independent source of authority for Ecology to use in its decision making apart from any specific statutory provisions intended to protect the public interest. Postema v. PCHB, 142 Wn.2d 68, 11 P.3d 726 (2000).

E. FUTILE CALL

Washington appellate courts have not adopted the futile call doctrine. As such, its vitality in this state remains an issue of first impression. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

The futile call doctrine is a common law created doctrine developed to address "circumstances where a senior water right holder may receive no benefit if the junior water rights are shut off, making it futile to require the junior to cease using water." Office of Attorney General, An Introduction To Washington Water Law (2000). Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

Traditionally, the futile call doctrine has been applied where a downstream senior appropriator calls for an upstream junior appropriator to cease using water so the senior rights will be satisfied. Under this doctrine, the junior water right holder is not required to cease using the water if he/she can prove the water would not reach the senior (i.e. the nonuse of the water would be futile). Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

The vitality of the futile call doctrine in Washington is suspect. Washington recognizes the interrelationship between ground and surface water; and Washington has moved away from managing its water resources on a creek-by-creek basis as was done under the common law system. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

The futile call doctrine was developed to address issues of regulation between two water users on a discrete water source. It is a doctrine that simply looks at the relationship between two water users competing for the same source and the nature of the watercourse between those two diversions. It is not necessarily implicated where the rights are adjudicated based on class. Fort v. DOE, PCHB Nos. 01-157 & 01-180 (2002).

IX. FORFEITURE

A. ABANDONMENT

A historic failure to exercise the right of recapture by one whose water seeps into bogs on the land of another implies abandonment of artificially stored groundwaters and said waters are available for appropriation. RCW 90.44.040; Simpson v. DOE, PCHB No. 846 (1976).

Water once-used under rights for a federal reclamation project is not abandoned by the United States while it remains within project boundaries, notwithstanding the absence of present plans to construct recapture facilities. The requisite intent to abandon is not lightly decreed. U.S. Bureau of Reclamation v. DOE, PCHB No. 84-64 (1985); Compare with Simpson v. DOE, PCHB No. 846 (1976).

Appropriative rights may be lost by abandonment through actual relinquishment coupled with the intention to abandon. Intention to abandon may be implied by non-use for an unreasonable period of time. Huegenin v. DOE, PCHB No. 79-77 (1980).

Ecology has the discretion to issue abandonment orders as a remedy for violation of 90.44 RCW and WAC 173-160. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Appellants may create a presumption of abandonment through proof of a long period of non-use. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994), aff'd Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

Appropriative rights may be abandoned. Abandonment is the intentional relinquishment of a known right. Both proof of the intent to abandon and

an act of relinquishment are required for abandonment. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994), aff'd Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997); Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The burden is on the person claiming abandonment to demonstrate that the use of water has, in fact, been intentionally abandoned. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994), aff'd Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997); Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Non-use alone is not abandonment, but long periods raise a rebuttable presumption of intent to abandon. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994), aff'd Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997): Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The presumption of abandonment is rebutted by the continuous existence of the Town and its continuous need of a municipal water supply. Unlike other users, municipalities seldom terminate and often grow. For this reason, non-use alone cannot constitute statutory relinquishment of a municipal water supply. Deducing an intent to abandon from non-use of a municipal water supply will therefore always be difficult. The element of intent to abandon has not been shown. Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994), rev'd by Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

A long abandoned right may not be deemed valid and subject to a transfer under RCW 90.03.380. Knight, et al. v. DOE, PCHB Nos. 94-61, 94-77, & 94-80 (1995), aff'd R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

When the presumption of abandonment is raised by a long period of nonuse, the burden shifts to the holder of the water right to prove nonabandonment by presenting evidence that would sufficiently explain why the water right has gone unused. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997).

The presumption that a municipal corporation has intentionally relinquished a water right by not exercising the right for a significant period of time is not rebutted by evidence of the municipality's

continuous existence and need for a water supply. Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997). (refuting Okanogan Wilderness League v. DOE & Town of Twisp, PCHB No. 93-316 (1994).

Under the common law, a water right is deemed to be completely or partially abandoned by nonuse if the water user intended to abandon the right and has actually relinquished all or part of it. The common law standard is applicable to the nonuse of water prior to July 1, 1967. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

The burden of proving that a water right has been abandoned is on the party claiming abandonment. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Courts will not lightly decree abandonment of a water right. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Ecology bears the burden of proof as to the issue of abandonment. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Where there is evidence of a long period of non-use, the burden may shift to the water right claimant to justify non-use. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Abandonment is the intentional relinquishment of a water right. The two critical elements of abandonment are non-use coupled with an intent to relinquish rights in water use. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Diligent efforts to sell a water right are evidence of an intent to not abandon. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Ecology's authority and, by derivation the PCHB's, is only to render a tentative decision on abandonment. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Where an appellant engaged in repeated, and ongoing attempts to come up with a feasible hydroelectric project, engaged in attempts to develop and market a power project, and paid licensing fees for an undeveloped project, the record as a whole showed that the appellant met its burden to rebut any presumption of abandonment. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

B. STATUTORY RELINQUISHMENT

1. GENERALLY

RCW 90.14.130 through RCW 90.14.200 sets forth a statutory forfeiture process which can result in relinquishment of perfected rights after five consecutive years of "voluntary" non-use. Forfeiture is avoided if "sufficient cause", as statutorily defined, is shown or if other stated grounds for exemption are met.

The provisions of RCW 90.14.130 require Ecology to make a preliminary determination of relinquishment which is subject to appeal to the PCHB. Only after affirmance of an Ecology determination does an order of relinquishment become final. A right to hearing is thus preserved before the order becomes final. Norman v. DOE, PCHB No. 81-175 (1982).

An adjudicated water right is a constitutionally protected property interest. A water right holder cannot be deprived of such an interest prior to notice and an opportunity to be heard. Sheep Mountain Cattle Co. v. DOE, 45 Wn. App. 427, 726 P.2d 55 (1986).

The purpose of water right relinquishment is not punishment, but rather to ensure that the waters of the state, which are limited in nature, are put to beneficial use. Bailey v. DOE, PCHB No. 93-8 (1993).

The relinquishment of waters by non-use was never intended to constitute a forfeiture, as that term is used in RCW 4.16.100(2). Bailey v. DOE, PCHB No. 93-8 (1993).

The use of the word "voluntarily" in RCW 90.14.180 refers to the act of nonuse, as opposed to the act of forfeiture itself. The use of the word "voluntarily" in RCW 90.14.180 does not import into the relinquishment statute a requirement of intent to relinquish. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994).

RCW 90.14.180 omits a requirement of intent to relinquish. This is distinguished from the common law doctrine of abandonment, which requires a showing of an intent to abandon. Thus, under the abandonment doctrine, appropriative rights may be lost by abandonment through actual relinquishment coupled with an intent to abandon. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994).

The actions constituting "sufficient cause" under RCW 90.14.140(1), are actions outside of the control of the water user. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994).

An order issued by Ecology under RCW 90.14.130 does not cause the relinquishment of a water right. Relinquishment of a water right can only occur following a notice and opportunity to be heard. Where the water right holder elects an appeal, a relinquishment cannot occur until proven by adversary process in this forum. Cocking Farms v. DOE, PCHB No. 93-251 (1994).

Non-municipal water supply systems are subject to relinquishment proceedings. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Ecology's limited powers in regulating one existing right in favor of another does not prevent Ecology from commencing relinquishment proceedings against any existing water right in an appropriate case. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Intent to abandon a water right is an element of common law abandonment, but not of statutory relinquishment. Motley-Motley, Inc. v. DOE, PCHB No. 96-175 (1997); Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The purpose of water right relinquishment is to ensure that the waters of the state, which are limited in nature, are put to beneficial use. Motley-Motley, Inc. v. DOE, PCHB No. 96-175 (1997).

Under RCW 90.14.130-.180, a water right is deemed to be completely or partially relinquished if the water user voluntarily fails to put the water to a beneficial use for a period of five successive years and none of the exceptions enumerated by the statute is established by the user. The statutory standard is applicable to the nonuse of water on or after July 1, 1967. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

A party may not rest on the existence of a water right certificate, the lack of prior relinquishment proceedings or prior water right change application decisions to avoid the statutory provisions of relinquishment. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

Ecology is not barred from initiating relinquishment under the doctrine of equitable estoppel. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

The imposition of relinquishment is not limited to the use of water by the current holder of a water right but to all persons in the chain of title holding an interest in the subject water right from the effective date of the

relinquishment statute. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

An order granting a change application is not a permit exempt from relinquishment. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

The possibility of relinquishment is a risk any party assumes in acquiring real property in the State of Washington. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

Under RCW 90.14.150 relinquishment does not apply to a permit issued under RCW 90.03.290 for a new water right. Merritt, et al. v. DOE, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999).

RCW 90.14.180 (relinquishment) applies to use of water authorized by a certificate of water right issued on or before June 30, 1967. Georgina Rich Trust, et al. v. DOE, PCHB Nos. 99-050, 99-054, 99-055, 99-056, 99-057, 99-058, 99-059 and 99-060 (2000).

Resumption of water use in good faith and in accordance with the terms of a certificate of water right does not cure relinquishment if there was nonuse of water during any continuous five-year period without sufficient cause after the effective date of RCW 90.14.180. Georgina Rich Trust, et al. v. DOE, PCHB Nos. 99-050, 99-054, 99-055, 99-056, 99-057, 99-058, 99-059 and 99-060 (2000).

The fundamental principles secured by Article I, Section 32 of the Constitution of the State of Washington do not preclude Ecology from claiming the rights to use water were relinquished by prior nonuse not withstanding later resumption of water use. Georgina Rich Trust, et al. v. DOE, PCHB Nos. 99-050, 99-054, 99-055, 99-056, 99-057, 99-058, 99-059 and 99-060 (2000).

The statutory exemptions to relinquishment do not apply to claims of abandonment before 1967. The statutory exemptions under chapter 90.14 RCW are to be narrowly construed to give effect to the policies of the act. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

RCW 90.14.180 applies to any appropriation authorized under RCW 90.03.330, 90.44.080, and 90.44.090, regardless of when such right was acquired. The fact a certificate may have been issued prior to that date, is irrelevant, because of the continuing requirement to beneficially use such water to retain ownership. Willows Run Golf Course v. DOE, PCHB No. 00-160 (2001).

Statutory forfeiture is inapplicable to unperfected water rights. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

2. BURDEN OF PROOF

On appeal of Order of Relinquishment, Ecology must establish that the appellant or predecessor has not beneficially used a water right for a period of five or more consecutive years. To defeat relinquishment, appellant then has the burden of showing "'sufficient cause" for non-use or that other exceptions to RCW 90.14.140 apply. Faith Financial Services v. DOE, PCHB No. 81-70 (1981); Sheep Mountain Cattle v. DOE, PCHB No. 81-85 (1983); Norman v. DOE, PCHB No. 81-175 (1982).

Where there is no indication of any use of the adjudicated certificates after 1967, the effective date of the relinquishment statute, and there is no evidence that appellants are entitled to an exemption, Ecology has satisfied its burden of proof on relinquishment. Jones, et al. v. DOE, PCHB Nos. 94-63, 64, 65 & 66 (1995).

On appeal of a relinquishment order, Ecology bears the burden of proving lack of beneficial use of the water for a period of five or more consecutive years. To defeat relinquishment, appellant then has the burden of showing "sufficient cause" for non-use or that other exceptions to RCW 90.14.140 apply. Cocking Farms v. DOE, PCHB No. 93-251 (1994); Motley-Motley, Inc. v. DOE, PCHB No. 96-175 (1997).

A party claiming that a water right has been relinquished under RCW 90.14.130 and .160-.180 has the burden of proving nonuse for the requisite period. The burden of proving that the nonuse of a water right is excused by a statutory exception to relinquishment is on the holder of the right. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

3. WATER RIGHTS CLAIMS

A filed claim is not the equivalent of a permit or certificate. Thus, where a withdrawal was initiated after the 1945 creation of the groundwater permit system, the filing of a claim provided no defense to the issuance of a cease and desist order. Peterson v. DOE, PCHB No. 77-15 (1977).

The filing of a statement of claim operates to forestall the relinquishment of a right, but the details set forth in a statement of claim, such as quantity, acreage and priority are not controlling in an adversary hearing before the PCHB. Mackenzie v. DOE, PCHB No. 77-70 (1979).

Where permit approval is challenged on the basis of prior rights to the source evidenced by a registered claim, Ecology and the PCHB must make a tentative evaluation of the validity of the claim. Anderson & Assocs. v. DOE, PCHB No. 81-76 (1983).

The relinquishment feature of the claims registration statute is not an unconstitutional taking of property. However, the doctrine of substantial compliance may be used in determining whether a filing meets the requirements of the statute. DOE v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

In reopening the claims registration period briefly, chapter 435, Laws of 1985, was not to affect or impair any "water right" existing prior to July 28, 1985. The term "water right" as used was intended to apply to traditional proprietary rights, not to minimum instream flows established by regulation. Wenatchee-Chiwawa Irrigation District v. DOE, PCHB No. 85-215 (1986).

Absent a state issued appropriation permit or certificate, any person claiming a diversionary right is conclusively presumed to have relinquished the right, if no statement of claim was filed during the statutory period provided by chapter 90.14 RCW. Filings made outside of the statutory period cannot constitute substantial compliance. W-I Forestry Products v. DOE, PCHB No. 87-218 (1988).

Under Washington's statutory scheme, no water right can exist unless evidenced by a permit or Certificate or unless the subject of a Registration Act claim. Logandale Water Assoc. v. DOE, PCHB No. 89-22 (1989).

The relinquishment to the state, pursuant to RCW 90.14.160, of unused water rights acquired by appropriation does not result in a "taking" of property without just compensation within the meaning of the Fifth Amendment. DOE v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Because RCW 90.14.065 (amending claim filings) operates as exceptions to the relinquishment statute, it must be narrowly construed. Papineau v. DOE, PCHB No. 02-048 (2002).

4. EXCEPTION: UNAVAILABILITY OF WATER

Under RCW 90.14.140(1)(a) the water user has the burden of proving that its nonuse was due to unavailability of water. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994).

5. EXCEPTION: OPERATION OF LEGAL PROCEEDING

"Sufficient cause" for non-use of a water right for five consecutive years is provided by the pendency of a general water rights adjudication during the period. Attwood v. DOE, PCHB No. 82-58 (1983).

The "operations of legal proceedings" exemption to relinquishment under RCW 90.14.140 does not apply to land in a trust where the trustee determined that the cost of redeveloping the well on the property would have been prohibitive and none of the beneficiaries challenged the trustee's decision. Bailey v. DOE, PCHB No. 93-8 (1993).

The PCHB has defined legal proceedings, for purposes of the relinquishment statute, as all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal for the acquiring of a right or the enforcement of a remedy. A water rights adjudication is a legal proceeding. Georgia Manor Water Association v. DOE, PCHB No. 93-68 (1994).

Under RCW 90.14.140(1)(d), the nonuse of a water right is excused by the operation of legal proceedings only if the nonuse is the result of or is attributable to the legal proceedings (i.e., the legal proceedings prevent the water from being used for any beneficial purpose). R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

6. EXCEPTION: FEDERAL LAW

The "federal laws restriction" exemption to relinquishment under RCW 90.14.140 does not apply where the non-use of the water right was the direct result of the restrictions imposed by the United States Department of Agriculture, in the CRP agreement when the agreement was entered into voluntarily by the holder of legal title to the land. Bailey v. DOE, PCHB No. 93-8 (1993).

7. EXCEPTION: STANDBY SUPPLY

The exemption from relinquishment for rights used for a standby or reserve supply is met by a well in good condition with pumping and distribution equipment readily available, though not necessarily in place. Norman v. DOE, PCHB No. 81-175 (1982); Turner v. DOE, PCHB No. 81-177 (1982).

Where an irrigation right has not been used for five consecutive years, but the facilities are maintained for a standby or reserve water supply, an order of relinquishment of the irrigation right is proper, except as to use

for a standby or reserve water supply. Norman v. DOE, PCHB No. 81-175 (1982); Turner v. DOE, PCHB No. 81-177 (1982).

For purposes of RCW 90.14.140(2)(b), the issue of whether water has been or is being used as a standby or reserve resource is a question of fact that is relevant only at the time it is alleged that the user's water right has been relinquished. DOE v. Acquavella, 131 Wn.2d 746, 935 P.2d 595 (1997).

8. EXCEPTION: DETERMINED FUTURE DEVELOPMENT

Where several intended plans for future use are inconsistent with one another and subject to change, they do not meet the criteria of a "determined future development" as contemplated under RCW 90.14.140(3). Turner v. DOE, PCHB No. 81-177 (1982).

Once it has been shown that the water user failed to use water for five consecutive years, burden of proof shifts to such user to establish that it qualifies for the exception for a "determined future development." Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

The determined future development exception is narrow. The PCHB interprets "determine" to mean "to come to an end," and "to fix conclusively or authoritatively." Objective evidence of commitment to the proposed "determined future development" includes evidence that owner spent time fixing up the place, but not require specific evidence establishing commitment to the development. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

The determined future development exception must be interpreted in a way that is consistent with the underlying purposes of RCW 90.14, which are to ensure adequate records and to return unexercised water rights to the state. Where the plan does not satisfy statutory requirement for a conclusively fixed future use, the water right should be relinquished. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

Objective evidence of commitment to the proposed "determined future development" includes the requirement that the period in which the user intends to utilize in preparation of the future development be commensurate with the time necessary to implement the plan. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

The nonuse of a water right is not excused under the determined future development unless the development is conclusively or authoritatively fixed (i.e., there is a firm and definitive plan) before the expiration of the five-year period of nonuse specified by RCW 90.14.160 for relinquishment of the right. An investigation into whether development is feasible,

without more, does not constitute a fixed, definitive plan. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

For purposes of "a determined future development" the development need not be completed within the 15-year period, however some affirmative steps toward realization of the fixed development plans must occur within the 15-year period in order for the statutory exception to apply. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

Factors that may serve as objective evidence indicating actual implementation of a fixed development plan are: (1) applying for necessary governmental building or land use permits, (2) notifying Ecology of plans to use the water right in connection with a future development, (3) actual physical development consistent with the fixed development plans such as clearing land or commencing construction, and (4) acquiring additional lands, rights, or materials needed to implement the fixed development plan. R.D. Merrill Co. v. PCHB, 137 Wn.2d 118, 969 P.2d 458 (1999).

The amount of water available for transfer in a water right change is properly based on the historic use under the water right if alternative plans are begun within the five-year relinquishment period under the determined future development exception from relinquishment. Tulalip Tribes of Washington v. DOE, PCHB No. 01-106 (2002).

X. WATER WELL CONSTRUCTION

A. CONSTRUCTION STANDARDS

It is unlawful to construct a well without complying with water well construction rules. The construction rules are predominantly found in chapter 173-160 WAC, and in chapter 508-12 WAC. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Well construction that does not preserve the natural barriers to groundwater movement and therefore allows interaquifer transfers violates WAC 173-160-075. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

Ecology interprets the requirement for completion of a well, contained in RCW 18.48.050 and WAC 173-160-050, to mean that a well is complete when the drilling rig and tools leave the site. Dietrich Drilling v. DOE, PCHB No. 92-74 (1992).

Removal of a drilling rig is a clear indication by the driller that his work on that well is complete. The fact that he may have left some tools on the

site does not contradict that conclusion. Dietrich Drilling v. DOE, PCHB No. 92-74 (1992).

As an experienced well driller, Appellant was expected to take the necessary precautions to prevent the cascading waters that could reasonably be expected to flow through and out of a pervious layer of gravely soil at 25-30 foot of depth, during seasonal rains. Horlacher v. DOE, PCHB No. 95-2 (1995).

RCW 18.104.040(4)(a) empowers Ecology to adopt rules for the construction and maintenance of wells. These rules may also include methods of sealing wells to prevent contamination of groundwater resources and to protect public health and safety. Horlacher v. DOE, PCHB No. 95-2 (1995).

WAC 173-160-215 requires that well-drillers construct their wells in a manner that prevents "the production of inordinate amounts of ... turbid water." Additionally, it restricts the use of perforated pipe as follows: Perforated pipe completion is suitable only for a coarse-grained, permeable aquifer where the withdrawn waters are free of excessive sand, silt or turbidity. Perforations above the static water level are not permitted. Horlacher v. DOE, PCHB No. 95-2 (1995).

In RCW 18.104.010, the Legislature declares drilling, making or constructing of wells within the state is a business and activity of vital interest to the public. In order to protect the public health, welfare, and safety of the people it is necessary that provisions be made for the regulation and licensing of well contractors and operators and for the regulation of well design and construction. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 90.44.110 requires in pertinent part that "all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use…." Gaydeski v. DOE, PCHB No. 96-10 (1996).

WAC 173-160-085 mandates that all wells which are not in use, or are temporarily out of service, shall be securely capped such that no contamination can enter the well. A cap which can be removed easily by hand is insufficient to satisfy the objective of this regulation. Gaydeski v. DOE, PCHB No. 96-10 (1996).

The PCHB is unaware of any regulation which requires that wells be decommissioned within a specific time, nor did Ecology issue any specific order requiring the specific decommissioning of the subject wells. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 18.104.040(4) empowers Ecology to adopt rules for the construction and maintenance of wells. These rules may include: "(a) [s]tandards for the construction and maintenance of wells and their casings; [and] (b) [m]ethods of capping, sealing, and decommissioning wells to prevent contamination of groundwater resources and to protect public health and safety." Gaydeski v. DOE, PCHB No. 96-10 (1996).

WAC 173-160-075 requires the sealing of the well be reasonably contemporaneous with its drilling, in order to provide assurance that there will be no movement of water between aquifers, and to protect water quality. Any significant delay in filling of the annular space, even in a dry well, obviously increases the risk of contamination of groundwater. If one drills a well without simultaneously sealing it, any water in the annular space, has the potential, depending upon the pressure thereof, of moving up or down into different water-bearing strata. If that water contains contamination, it will have the opportunity to spread to new locations, with the attendant consequences. Not sealing wells until a good source of water is present is contrary to Ecology's sealing requirements. Gaydeski v. DOE, PCHB No. 96-10 (1996).

B. VARIANCE

Strict compliance with well drilling standards is required, unless a variance is applied for in advance and granted. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991); City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

The granting of a variance that would allow interaquifer transfer or the impairment of water quality would be an abrogation of a substantive provision of the laws of the State of Washington. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

When seeking variance from well drilling regulations, applicant must show specifications are impractical and must offer alternative specifications to DOE. City of Moses Lake v. DOE, PCHB No. 91-13 (1992).

Ecology properly denied appellant's request for a variance from the minimum standards for water well construction, chapter 173-160 WAC: Appellant's proposed conversion of a landfill monitoring wells to domestic wells conflicted with WAC 173-160-171(3)(b)(vi) prohibiting domestic wells within 1,000 feet of a landfill boundary and WAC 173-160-420(1) prohibiting the conversion of a resource protection well to a domestic well. Pashniak v. DOE, PCHB No. 99-113 (2000).

A variance to the minimum standards for water well construction may be granted only when the application for variance proposes a specification that will "provide equal or greater human health and resource protection than the minimum standards." Pashniak v. DOE, PCHB No. 99-113 (2000).

Ecology properly denied appellant's request for a variance from the minimum standards for water well construction, chapter 173-160 WAC. In threatening both the quality of water from the well and the groundwater resource near the well, the proposal did not provide protection for human health and resources which was equal or greater than the minimum standards. Pashniak v. DOE, PCHB No. 99-113 (2000).

Ecology's denial of a variance to the minimum standards for water well construction was justified in light of the known proximity of the wells to polluted groundwater and the propensity of the wells to spread, rather than confine, that pollution. The variance denial was consistent with WAC 173-60-106. Pashniak v. DOE, PCHB No. 99-113 (2000).

C. WELL DRILLERS REQUIREMENTS

A start-card not filed with Ecology 72 hours before drilling is started violates WAC 173-160-055. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

Failure to provide certain documentation, which Ecology needs to ensure adequate protection of the public interest, is a violation. Without such information, provided in a timely faction, Ecology would be unable to adequately monitor the proper care and protection of a major public resource. Dietrich Drilling v. DOE, PCHB No. 92-74 (1992).

In RCW 18.104.010, the Legislature declares drilling, making or constructing of wells within the state is a business and activity of vital interest to the public. In order to protect the public health, welfare, and safety of the people it is necessary that provisions be made for the regulation and licensing of well contractors and operators and for the regulation of well design and construction. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 18.104.030(6) and RCW 18.104.180(2), requires that wells be constructed either by a licensed well-driller, or by one who was under the direction, supervision and control of a licensed well- driller, who is present at the site. "Supervision" is defined as "being present at the site of well construction and responsible for proper construction at any and all times well construction equipment is being operated." These laws do not allow an unlicensed driller to construct a well under the supervision of someone who is off the site and in contact with the well-driller by

telephone. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 18.104.093 authorizes Ecology to issue an operator's training license. Once such a license is obtained, the holder may operate a drilling rig without the direct supervision of a licensed will-driller, if the operator is "available by radio, telephone, or other means of communication." Gaydeski v. DOE, PCHB No. 96-10 (1996).

The Board has no authority to compel Ecology to issue a well driller's license. A court may not mandate an agency to perform a discretionary act. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 18.104.048 requires a well-driller to submit a start card prior to commencing the construction of a well. Gaydeski v. DOE, PCHB No. 96-10 (1996).

RCW 18.104.050 provides that the well-driller shall submit a well report to Ecology within 30 days of the completion of construction or alteration of a well. Gaydeski v. DOE, PCHB No. 96-10 (1996).

No withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to Ecology and a permit has been granted. Moss, et al. v. DOE, PCHB Nos. 96-138, 96-156, 96-163, 96-166, 96-181 (1997).

D. ENFORCEMENT

Suspension of well driller's license was not justified where driller was barred from property by owner and unable to complete well in conformity with regulations. Bach v. DOE, PCHB No. 636 (1974).

PCHB is without jurisdiction to grant relief on a citizen's complaint against a well driller under RCW 18.104.120. Ecology may sanction drillers through license suspension or revocation, which action is then appealable to the PCHB. Nicolai v. B & I Well Drilling, PCHB No. 78-99 (1978).

A regulatory order requiring corrective action is appropriate where well sealing requirements of Ecology's regulations have not been complied with. Suspension of a driller's license is proper where a regulatory order requiring corrective action is not obeyed. Walker v. DOE, PCHB No. 80-163 (1981).

A driller must be given an opportunity to comply with a valid regulatory order issued by Ecology. A well owner who chooses to bar the driller

from his property to make ordered corrections cannot complain that the well's problems have not been solved. Hicks v. DOE, PCHB No. 81-129 (1982).

Where Ecology has reasonably determined that cascading water in a well presents a danger to neighboring wells, a regulatory order specifying corrective action is appropriate. Such an order was properly directed to the well driller when the driller knew or should have known upon initial drilling that the occurrence of cascading water was a substantial likelihood. Ponderosa Drilling and Development Inc. v. DOE, PCHB No. 85-212 (1986).

Ecology may issue a regulatory order for the correction of well construction violating the standards of chapter 173-160 WAC. A water well drillers license may also be revoked for violating such standards. Where a regulatory order has not been complied with, it is a reasonable exercise of prosecutorial discretion to revoke a driller's license. Schoch v. DOE, PCHB No. 86-167 (1987).

A well which has ceased to be used must be abandoned in accordance with safety regulations promulgated by Ecology. Where abandonment has been improperly performed, Ecology may require corrective action by regulatory order. The order may be directed to the person who created the health and safety hazard, notwithstanding that such person has sold the property where the well is located. Skoda v. DOE, PCHB No. 87-83 (1987).

Where there is no evidence that well drillers were aware of casing requirements in a groundwater permit issued to a landowner, the property owner should be joined in Ecology's enforcement action brought some nine years after the well was constructed. Adcock & McLanahan v. DOE, PCHB No. 87-215 (1988).

Ecology has discretion to decide from whom to seek correction of a violation of statute or regulation where parties are joint and severally liable for violation. Barnett, et al. v. DOE, PCHB Nos. 90-70 & 72 (1991).

The Board, in reviewing the amount of a penalty, will consider the following factors: the nature of the violation; the prior conduct of the violator; and actions taken to solve the problem. Dietrich Drilling v. DOE, PCHB No. 92-74 (1992).

RCW 18.104.155 creates three categories of violations in water well construction: minor, serious and major. Serious violations are those that pose a critical or serious threat to public health, safety and the

environment. Improper well construction qualifies as a serious violation. Horlacher v. DOE, PCHB No. 95-2 (1995).

RCW 18.104.155(3)(b) establishes the minimum and maximum civil penalties for serious violations, as $500 and $5,000 respectively. Horlacher v. DOE, PCHB No. 95-2 (1995).

The PCHB considers the reasonableness of a civil penalty, on a de novo basis, by reviewing the following three factors: 1) the nature of the violation; 2) the prior behavior of the violator; and 3) actions taken to rectify the problem. Horlacher v. DOE, PCHB No. 95-2 (1995).

Construction of a well without a license is a major violation, under RCW 18.104.155(2)(c)(i). The penalty for each such violation shall be not less than $5,000, nor more than $10,000. Gaydeski v. DOE, PCHB No. 96-10 (1996).

Failure to file a start card and the appropriate fees prior to drilling a well constitutes a minor violation. Gaydeski v. DOE, PCHB No. 96-10 (1996).

The PCHB reviews the reasonableness of a civil penalty de novo. In determining reasonableness, the PCHB looks to the nature of the violation, the prior behavior of the violator and actions taken to rectify the problem. Gaydeski v. DOE, PCHB No. 96-10 (1996).

XI. DAM SAFETY

The provisions of RCW 90.03.350, requiring the approval as to safety of dams or controlling works for the storage of more than 10 acre-feet of water were properly applied by conditioning a reservoir permit to provide for containment of the 100 year frequency flood and passage of the probable maximum flood. Rumball v. DOE, PCHB No. 86-127 (1987).

Absent conflicting evidence, classification of a dam as a "high hazard structure" supports a regulatory order under RCW 43.27A.190 to correct structural deficiencies or to drain the reservoir and remove the dam. Financial inability to comply does not provide a basis for overturning such regulatory order. Elliot Lake Water Co. v. DOE, PCHB No. 88-20 (1989).

XII. ENVIRONMENTAL LAWS

A. SEPA

1. GENERALLY

The applicability of the State Environmental Policy Act (SEPA) to appropriation permit decisions was established shortly after the Act's passage in 1971, by the decision in Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973). Procedurally, SEPA requires an evaluation of environmental impacts before a permit is approved. If the proposal is likely to have a probable significant adverse environmental impact, a detailed environmental impact statement must be prepared. (WD).

The Legislature has enacted a substantial exemption from the impact statement requirement for irrigation projects - projects diverting 50 cubic feet *per se*cond or less. RCW 43.21C.035.

SEPA regulations contain an exemption for appropriations for any purpose of one cubic foot *per se*cond of surface water or 2,250 gallons per minute of groundwater. WAC 197-11-800 (4)(b).

Ecology's ruling on a declaration of artificially stored groundwater in the Quincy Groundwater Subarea was merely the remaining governmental action needed to account for groundwater in the locality after creation of the subarea. Nothing Ecology could decide would alter what was physically constructed prior to the effective date of SEPA. SEPA is not applicable to projects which, prior to its effective date, reached a critical stage of completion precluding consideration of environmental protection desired by the Act. Van Holst v. DOE, PCHB No. 798-A (1976).

If Ecology is not the lead agency and environmental concerns are to be addressed in other non-exempt licenses of broader impact, SEPA does not prevent issuance of appropriation permit where impact statement supports conclusion of no measurable impact on water quality. Lake Samish Community Assoc. v. DOE, PCHB No. 78-268 (1979).

Environmental impact statement (EIS) prepared by City as part of its water system plan to divert additional water and construct a pipeline for municipal supply could be used by Ecology in complying with SEPA. Appropriation permit application does not involve a different proposal. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Where nature of any future proposals to divert or store water, beyond instant application, are unknown, EIS is not defective in failing to discuss them. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Environmental impact statement is not defective in failing to discuss measures to enhance river's fishery. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Under prior version of SEPA rules, Ecology could properly approve categorically exempt groundwater appropriation, even though project as a whole was non-exempt and threshold determination had not yet been made. Balmer Garden Water Co. v. DOE, PCHB No. 82-68 (1983).

Permit decisions, otherwise categorically exempt from SEPA process, may require an environmental impact statement if the proposal in fact constitutes "a major action significantly affecting the quality of the environment." Balmer Garden Water Co. v. DOE, PCHB No. 82-68 (1983).

The adequacy of an environmental impact statement is a question of law, judged by the rule of reason. The decision of an agency that an EIS is adequate must be accorded substantial weight. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Where many agencies have permit responsibilities in connection with a project, each is entitled to supplement the lead agency's EIS if increasing levels of detail reveal further significant adverse environmental effects. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Approval of a groundwater appropriation with conditions when of 2,250 gallons per minute or less is categorically exempt from the threshold determination and EIS requirements of SEPA, by virtue of the water rights exemption of WAC 197-11-800(4). Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

By virtue of WAC 197-11-055 a threshold determination and environmental impact statement, if required, are to be prepared at the point "when the principal features of a proposal and its environmental impacts can be reasonably identified." Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Ecology is the lead agency for purposes of making the threshold determination required by the State Environmental Policy Act, chapter 43.21C RCW. Oroville-Tonasket Irrigation District v. DOE, PCHB Nos. 91-170 & 93-134 (1996).

Regulatory exceptions, like WAC 197-11-305(1)(b)(ii), should be narrowly construed to give the maximum effect to the policy underlying the general rule. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

SEPA's cardinal purpose is to ensure the evaluation of environmental factors in agency decision-making. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The SEPA rules define a proposal as "both actions and regulatory decisions of an agency...[which exist] at that stage in the development of an action when an agency is presented with an application, or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal...." WAC 197-11-784. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The denial of a change application is not a governmental action subject to SEPA review. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

The EIS contemplated the preparation of the streamflow mitigation plan and contingent treatment plan. Since the EIS addendum provided additional analyses and information without changing the final EIS analysis of significant impacts and alternatives, there was accordingly no requirement to prepare a supplemental EIS. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

The procedural requirements of SEPA have been described as an environmental full disclosure law. The procedural rules do not dictate any particular result but do require fully informed decision making by government bodies on actions that will significantly impact the environment. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

Once a final EIS is issued, the decision to subsequently amend, to issue an addendum or undertake a supplemental EIS is governed by WAC 197-11-600. Okanogan Highlands Alliance, et al. v. DOE, PCHB Nos. 97-146, 97-182, 97-183, 97-186, 99-019 (2000).

2. CATEGORICAL EXEMPTION

Where the appropriation in question is categorically exempt from SEPA's procedural requirements and no substantive environmental case is presented, no violation of SEPA is made out. Madrona Community v. DOE, PCHB No. 86-65 (1987).

Categorically exempt groundwater appropriations are removed from exempt status under circumstances set forth in WAC 197-11-305. However, before an action can fit within this limitation on exemptions, the series of actions to which it is related must be sufficiently in focus to constitute a "proposal". A proposal does not exist until the environmental effects can be meaningfully evaluated. Bucklin Hill Neighborhood Assoc. v. DOE, PCHB No. 88-177 (1989).

Before an action can fit within the limitations on exemptions, the series of actions to which it is related must be sufficiently in focus to constitute a "proposal." WAC 197-11-305. Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Categorical exemptions are subject to limitations contained in WAC 197-11- 305. Under WAC 197-11-305, the exempt aspects of proposals may proceed prior to environmental review if there is no adverse environmental effect or limitation on the choice of reasonable alternatives. See WAC 197-11-070. Citizens for Sensible Development v. DOE, PCHB No. 90-134 (1991).

Ecology's decision to batch process water rights applications is a procedural action and is itself categorically exempt from SEPA under WAC 197-11-800(20). Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

A proposed action or proposal triggers SEPA assessment. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

An alternatives analysis under RCW 43.21.030(2)(e) is prohibited if the action is categorically exempt. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

If a water right application seeks less than 2,250 gallons per minute, it is squarely within the categorical exemption from SEPA's "threshold determinations and EIS requirements". Yakama Indian Nation v. DOE,

PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The purpose of categorical exemptions is to facilitate the expeditious enactment of selected projects and decisions by removing them from the threshold determination and EIS process. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Categorical exemptions apply to independent analysis created by the alternatives analysis mandated in RCW 43.21c.030(2)(e). Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998) (following Dioxin II) (Overturning Marine Environmental. Consortium v. DOE, PCHB Nos. 96-257 et seq.).

Legislative intent behind categorical exemptions to SEPA: avoidance of the costs and delays inherent in individualized review of water rights applications. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The location of the permit application within a watershed does not establish a sufficient physical relationship to disqualify it from SEPA's categorical exemption. If mere location in the same geographic area renders projects physically related under SEPA, then building permits for single family houses planned for opposite sides of the same town would be physically related. SEPA's categorical exemption for residences of four units or less would be meaningless. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

Agency actions which relate "solely to government procedures and [contain] no substantive standards respecting use or modification of the environment" are exempt from SEPA environmental review. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The SEPA rules contain an exception for an action which, on its face, is categorically exempt if that action belongs to a "series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse impact in the judgment of an agency with jurisdiction." Yakama Indian Nation v. DOE, PCHB Nos.

93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

B. CLEAN WATER ACT

The Clean Water Act and the anti-degradation policy are not limited to point source discharge. Yakama Indian Nation v. DOE, PCHB Nos. 93-157, 93-166 through-93-168, 93-173 through 93-177, 93-205 through 93-212, 93-215 through 93-221, 97-117 and 97-118 (1998).

The quantity of water use may constitute pollution and be regulated as an "other limitation" under Section 401 of the Clean Water Act. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Ecology has authority to impose bypass flow conditions through Section 401 Water Quality Certification that may affect the exercise of pre-existing water rights. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as a "man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Water quantity is an element of water quality regulation. Ecology may condition a project's use of water on a specific discharge to achieve compliance with narrative water quality standards. Pend Oreille PUD No. 1 v. DOE, PCHB Nos. 97-177, 98-043 & 98-044 (2000).

Water quality issues under the Clean Water Act, which include water quantity issues, i.e., instream flow levels affecting designated uses, are properly within the scope of the Clean Water Act. Conditions imposed to protect water quality fall within the legitimate purposes for which the Clean Water Act was designed. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

DOE has authority under the Clean Water Act to condition issuance of a water quality certificate on maintenance of the specified instream flows. Bypass flow requirements as conditions in a water quality certificate do not reflect or establish an applicant's proprietary right to water, but

"merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act." Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The state Water Pollution Control Act grants authority to DOE to take "all action necessary ... to meet the requirements" of the Clean Water Act. RCW 90.48.260. There is no restriction in chapter 90.48 RCW that prohibits DOE, when carrying out this broad grant of authority, from imposing conditions that may affect an existing water right. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

Water quantity is not distinguishable from water quality where impact on designated uses is concerned: "reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution." Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

The Legislature has distinguished between minimum instream flows under chapters 90.03, 90.22, and 90.54 RCW, and instream flow conditions in a Section 401 certification under the Clean Water Act and the Water Pollution Control Act, chapter 90.48 RCW. Public Util. Dist. No. 1 of Pend Oreille County v. DOE, 146 Wn.2d 778, 51 P.3d 744 (2002).

C. WATER RESOURCES ACT OF 1971

The Water Resources Act of 1971 (WRA) sets forth a declaration of "fundamentals" for the use and management of the state's waters. RCW 90.54.020. Implementation of these fundamentals can occur in a variety of ways - the adoption of generally applicable regulations, the conditioning of individual permits, the initiation of enforcement actions.

The "fundamentals" include a statutory listing of beneficial uses and a statement of the "maximum net benefits" principle as a basis for allocation decisions. Additionally, policies directed primarily at environmental protection are declared: (a) instream flow and lake level provisions and (b) requirements protective of water quality, incorporating a non-degradation standard.

The WRA calls for the creation of a state-wide program, implemented through regulations, to guide future water allocation decisions. RCW 90.54.040. This program can include the reservation of identified water for beneficial use in the future and the withdrawal of waters from additional appropriations pending the acquisition of sufficient data and information "for the making of a sound decisions." RCW 90.54.050.

The WRA made water quality considerations relevant to the granting of water appropriation permits. This became clear through the landmark opinion in Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

Where irrigation use would deprive a stream of all natural flow during the irrigation season and reduce aesthetics of a natural pond, the proposal would be detrimental to values contemplated in RCW 90.54.020 and denial of permit application should be affirmed. McQueen v. DOE, PCHB No. 81-18. (1981).

The establishment of instream flows by regulation is the first step in meeting the "maximum net benefits requirement." However, flows in excess of instream flows are also subject to this requirement. Whether, flows in excess of established instream flows are to be made available for fish habitat enhancement or for diversion from the stream depends on the balancing of competing, beneficial uses. Northwest Steelhead and Salmon Council v. DOE & Tacoma, PCHB No. 81-148 (1983).

Under RCW 90.54.020(7) the development of multiple domestic water supply systems is not generally encouraged. However, where a new source will provide a reliable potable supply for a user not so supplied by the existing system, the statute is not violated by granting a permit for the new source. Vehrs v. DOE, PCHB No. 82-36 (1982).

The policies of the WRA of 1971 give content to the "public interest" criterion of the Water Code. "Maximum net benefits" (RCW 90.54.020(2)), when read together with "maximum practicable "reduction of waste (RCW 90.03.005), and "highest feasible development" (RCW 90.03.290), expresses a policy that applications processed simultaneously be considered in the context of competing demands for the resource, rather than strictly on the basis of priority of filing. Napier & Sherman v. DOE, PCHB No. 84-299 (1985).

Base flows are to be set at levels which are necessary for the preservation of fish and related values. Allocation of waters for fish habitat in excess of base flows is subject to the "maximum net benefits" ride, requiring a balancing of interests. City of Tacoma v. DOE, PCHB No. 86-118 (1989).

The Legislature enacted the Water Resources Act in 1971. The State Supreme Court concluded that this enactment was as vigorous as the State Environmental Policy Act in its policy declaration. Specifically, the Court declared that "[t]he state water resource policy finds that the public health, preservation of natural resources and aesthetic values are deserving of

promotion, in addition to the state's economic well-being. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

The Water Resources Act directed Ecology to provide a process for decision making on future water resource allocation and use and to reduce or resolve conflicts among water users and interests. Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

Ecology promulgated chapter 173-500 WAC as the backbone of its comprehensive state water program to "provide a process for making decisions on future water resource allocations and uses." WAC 173-500-010(2). That regulation divided the state into 62 areas known as water resource inventory areas ("WRIAs"). Wirkkala, et al. v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

It is the policy of Washington State to promote the use of public waters to obtain the maximum net benefits from both diversionary uses of water and retention of waters in their natural courses for instream flows and natural values. Petersen v. DOE, PCHB No. 94-265 (1995).

The Water Resources Act of 1971 ("WRA"), at RCW 90.54.020(3)(a), provides that "[w]ithdrawals of water which would conflict [with base flows] . . . shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." This overriding public interest provision is an exception to the statutory scheme establishing base flows. The burden of proving entitlement to the exception is on the party asserting the entitlement. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

The first prong of the statutory exception in RCW 90.54.020(3) is the requirement that the proposed appropriation serve a public, as opposed to a private interest. The second prong requires that the public interest be so great as to override the harm to other public interests. This aspect of the exception invokes a balancing test. On the one hand are the public values protected by base flows. These are identified in RCW 90.58.020(3)(a) as: "preservation of wildlife, fish, scenic, aesthetic and other environmental and navigational values." The appropriator's use is weighed against the public values protected by based flows to see if it serves an overriding public interest. The requirement of showing an "overriding public interest," as opposed to any interest, means that the exception is to be narrowly construed. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

RCW 90.54.020(3) calls for individualized determinations, and therefore the exception should be applied on a case-by-case basis. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

There is no overriding public interest in granting a water right under the exception in RCW 90.54.020(3) where "over one-half of the applicant's requested appropriation is for a golf course, which would appear to serve primarily, the occupants of the privately-owned homes it expects to develop and market." Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

There is no overriding public interest in granting a water right under the exception in RCW 90.54.020(3) where the applicant could meet future demand for water from a possible future source. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

Normally, public recreational uses, which do not depend upon the navigation or use of the surface waters of the state, may not override the base flow regulations of Ecology, which are designed to protect essential fish, wildlife, recreational, environmental and aesthetical values for the public. School uses, however, including required physical education uses are an inherent part of our education system. Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

The overriding public interest provision is an exception to the overriding statutory scheme establishing base flows RCW 90.54.020(3) allows withdrawals "only in those situations where it is clear that overriding considerations of the public interest will be served." The burden of proving entitlement to the exception is on the party asserting the entitlement. The exception was intended by the Legislature to be applied on a case-by-case basis. Auburn School District No. 408 v. DOE, PCHB No. 96-91 (1996).

Granting a water right to a water purveyor that would serve residents of a subdivision lying within a City's UGA would be inconsistent with statutory language and detrimental to the public interest: Purveyor fell within second portion of RCW 90.54.020(7), which discourages the development of multiple domestic water supply systems, "which will not serve the public generally,"…"where water supplies are available from water systems serving the public." Cascade Investment Properties, Inc., et al. v. DOE, PCHB Nos. 97-47 & 48 (1997).

D. GROWTH MANAGEMENT ACT

The Growth Management Act does not create a categorical exemption to the base flow requirements of the Water Code. Black Diamond Assocs. v. DOE, PCHB No. 96-90 (1996).

XIII. PUBLIC WATER SYSTEMS

A public water system may be either municipal or non-municipal. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

A public water system is any system providing water intended for, or used for, human consumption or other domestic uses. It includes, but is not limited to, the source, treatment for purifying purposes only, storage, transmission, pumping and distribution facilities where water is furnished to any community, or number of individuals, or is made available to the public for human consumption or domestic use, but excluding water systems serving one single family residence. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

If, an application for a permit satisfies the statutory criteria, the availability of a public water supply is not grounds, as a matter of policy, to deny the application. Jorgenson v. DOE, PCHB No. 96-57 (1997).

Washington's water laws may be read to support the development and maintenance of public water supply systems. Jorgenson v. DOE, PCHB No. 96-57 (1997).

Ecology's powers are limited in regulating one existing right in favor of another. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Municipal public water supply systems apply water to a beneficial use when pumps and pipes are put in place to satisfy the needs resulting from a normal increase in population, within a reasonable period of time. The holding also applies to non-municipal public water supply systems. Theodoratus v. DOE, PCHB No. 94-218 (1995), overruled DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Non-municipal water supply systems are subject to relinquishment proceedings. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

Recognizing that localized subdivision development may not expand as certainly as cities do, the time necessary to fill out a slowly developing subdivision may not be reasonable where there is intense competition for water by later applicants. Theodoratus v. DOE, PCHB No. 94-218 (1995), aff'd DOE v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

An applicant cannot be compelled by public policy to build a water main to a public water system's line and then to purchase water from the system. If he elects to do so, and thus exercises that water right, the appropriation under his own application must be reduced by the amount of water received from the system. The unlawful duplication of water rights does not occur until there is a duplicative exercise of such rights. This may be prevented by a condition that an applicant proposes appropriation from a lake be reduced by the amount of waters received from the water system, if any. Coles v. DOE, PCHB No. 96-93 (1997).

A "water system serving one single family residence" is not a "public water supply system" and is not banned from the planning area of a public water supply system. Such a system may be allowed under the agency coordination provision, RCW 90.03.386; does not unlawfully interfere with the encouragement of public water supply systems under RCW 90.03.020(7); and is not detrimental to the public interest under RCW 90.03.290. Coles v. DOE, PCHB No. 96-93 (1997).

Granting a water right to a water purveyor that would serve residents of a subdivision within a City's UGA would be inconsistent with statutory language and detrimental to the public interest: RCW 90.54.020(7), discourages the development of multiple domestic water supply systems, "which will not serve the public generally,"…"where water supplies are available from water systems serving the public." Cascade Investment Properties, Inc., et al. v. DOE, PCHB Nos. 97-47 & 48 (1997).

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